

# Flaws in the Laws Governing Employment References: Problems of "Overdeterrence" and a Proposal for Reform

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Barbara owns a small business. Two months ago, she decided to hire a new office manager. In the two months since that decision, she advertised the position, accepted and reviewed twenty-five applications, and interviewed the seven most promising candidates. After the interviews, she felt that three of the applicants she interviewed were better suited than the others for the position. Before deciding which candidate would receive the job offer, Barbara called to obtain employment references from each of the three candidates' current employers, and to confirm the generally favorable impressions she formed during the interviews. Barbara's telephone inquiries to two of the candidates' employers, however, prompted responses along the following lines: "I'm sorry—as a matter of policy, we don't give employment references for current or former employees, but can only verify their dates of employment, salary and job titles." Her reference inquiry to the employer of the third candidate prompted a detailed and unwavering positive reference; this applicant, however, would have been her *second* choice if the references of all three candidates had been comparable.

"How," Barbara wondered, "can I make a fair decision on who will receive the offer, when I can't get a detailed current reference for two of the top three candidates?" With some reluctance, Barbara decided to extend the offer to the candidate for whom she had been able to get a reference; Barbara reasoned that the employers who had refused to provide reference information must have a negative view of the candidates whom they employed, or they would have been more forthcoming.

The scenario described above, while hypothetical, is unfortunately all too common in the current workplace. Many employers have adopted policies, sometimes referred to as "no comment" policies, under which they refuse to provide job references for former or departing employees, regardless of whether the request comes from the employees themselves or their prospective new employers.<sup>1</sup> As the scenario described above illustrates, these policies work to the detriment of both prospective employers and prospective employees. This Article examines the reasons for the trend toward "no comment" reference practices and proposes reforms in the law governing

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1. See *infra* notes 2-12 and accompanying text.

employment references; because the Article concludes that the trend toward "no comment" policies is socially undesirable, the proposed reforms are designed to encourage employers to provide reference information more freely.

This Article will begin by reviewing, in Part I, some of the evidence of the increasing prevalence of "no comment" reference practices and explaining *why* "no comment" policies are socially undesirable. Part II analyzes *how* the current legal framework creates powerful incentives for employers to adopt "no comment" policies. Part III proposes and analyzes in detail a comprehensive package of reforms that should encourage employers to be more forthcoming with reference information. Finally, Part IV offers model legislation that may be adopted to effectuate the reforms discussed here; this legislation is necessary in light of practical limitations on judicial innovations in this context.

## I. THE PROBLEMS POSED BY "NO COMMENT" POLICIES

### A. *The Increasing Prevalence of "No Comment" Reference Policies*

Substantial evidence suggests that large numbers of employers have been or are being encouraged to adopt "no comment" or otherwise restricted reference policies. Evidence of the vitality of the "no comment" reference trend is found in the results of empirical surveys and in the lay press and legal commentary on employment reference practices.

#### 1. *Empirical Surveys*

The results of several recent empirical surveys support the conclusion that many employers have adopted restricted reference policies or are considering doing so.

In January 1993, Robert

Half International reported the results of a survey it conducted in 1992 of two hundred executives from the 1000 largest companies in the United States.<sup>2</sup> More than two-thirds (sixty-eight percent) of the responding executives believed that it was harder to obtain reference information in 1992 than it had been in 1989.<sup>3</sup> Commenting on the survey's results, Robert Half International-

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2. Robert Half International, Inc., Survey Shows Employers Find It Harder to Check References, Jan. 1993 (Press Release). Robert Half International, Inc. is a staffing services firm specializing in the accounting, finance and information technology fields.

3. The question the executives were asked and their responses were as follows:

Is it easier or harder to check a candidate's references today than it was three years ago?

Responses:

Harder	68 %
Easier	10 %
Same	17 %
Don't Know	5 %

*Id.*

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l's Chief Executive Officer stated: "Our litigious society is increasingly forcing former employers into taking a position of 'no comment' beyond verification of employment dates and salary."<sup>4</sup>

In 1992, Professors James Fenton and Kay Larimore of Francis Marion University reported the results of their survey of approximately nine hundred CEOs in the southwestern United States.<sup>5</sup> Approximately thirty-four percent of the executives responded to the survey, which focused on employment reference practices. Fenton and Larimore summarized the results of the survey as follows:

Firms do differ in their willingness to provide reference information. Overall, 62 percent of the firms responding have experienced openness and willingness by other employers to answer inquiries about past employees. However, only 38 percent of large firms have experienced this openness, compared to 73 percent of small firms.<sup>6</sup>

Similar results have been reported by the International Association of Corporate and Professional Recruiters (IACPR), which surveyed its membership annually between 1985 and 1993.<sup>7</sup> In reporting the results of its "Fourth Annual Membership Survey," conducted in 1989, IACPR noted that approximately forty-one percent of the responding human resource professionals worked for companies with formal written policies not to provide outside references.<sup>8</sup>

None of the empirical surveys discussed above purported to present a comprehensive picture of American businesses. Nonetheless, all of the surveys do suggest that a significant percentage of companies in the United States are responding to the current employment reference environment by adopting "no

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4. *Id.*

5. James W. Fenton, Jr. & Kay W. Larimore, *Employment Reference Checking, Firm Size and Defamation Liability*, 30 J. SMALL BUS. MGMT. 88 (1992).

6. *Id.* at 90. The fact that "no comment" policies appears to be more prevalent among large firms than among small firms may have several explanations. It is possible, for example, that small firms may be more likely than large firms to receive a significant percentage of their reference requests from other small firms from the same locality. If so, small firms may be more effectively dissuaded than large firms are from adopting "no comment" policies because of their personal familiarity with the reference requestors and concern over retaliatory or reciprocal "non-cooperativeness." Perhaps more plausibly, large firms may be considerably more likely than small firms to design their reference practices in consultation with employment lawyers; if this is the case, the greater prevalence of "no comment" policies among larger firms may reflect disparities in access to, or reliance on, legal advice.

Whatever the reasons for the greater prevalence of "no comment" policies among large firms, this article is based on the premises that (1) "no comment" policies are socially undesirable, whether used by large or small firms, and (2) the current legal framework does (or at least should) encourage the rational and well-informed employer—whether large or small—to adopt "no comment" policies. See *infra* notes 22-27 and accompanying text.

7. IACPR's membership consists principally of executives working in executive search and human resources positions. (The IACPR changed its name from the "National Association of Corporate and Professional Recruiters" in 1992.)

8. National Association of Corporate and Professional Recruiters, Inc., Fourth Annual Membership Survey Results 39 (1989). The IACPR's more-recent surveys do not include data on this same statistic.

comment" or otherwise limited reference strategies.<sup>9</sup>

## 2. *Lay Press and Legal Commentary*

Commentary in the lay press and by attorneys also supports the conclusion that "no comment" reference strategies are increasingly prevalent.

The lay press, including business-oriented journals, has been fairly consistent in reporting that "no comment" reference strategies are being widely employed; the commentators have also been consistent in attributing the prevalence of those strategies to employers' negative perceptions of the current legal environment. Thus, for example, one journal recently reported: "Currently, many firms are unwilling to provide information. Until the legal environment is perceived as being safer, organizations will continue to feel pressure to provide minimal information about previous employees to reduce their liability."<sup>10</sup>

Attorneys who have written or otherwise commented publicly about reference practices also have generally confirmed that "no comment" reference strategies are widely used by employers today.<sup>11</sup> Perhaps more importantly, many of the attorneys writing on this issue—who may be expected to be more risk-averse than the clients they advise—have strongly urged employers to adopt "no comment" or otherwise limited reference strategies to reduce the employers' potential exposure to liability arising from reference practices.<sup>12</sup> A recent chair of the American Bar Association's Labor and Employment Law

9. See Tim Weiner, *Fearing Suits, Companies Avoid Giving Job References*, N.Y. TIMES, May 8, 1993, at 37 ("A random survey of two dozen Fortune 500 companies found none that gave or received references freely.").

10. Lawrence S. Kleiman & Charles S. White, *Reference Checking Dilemma: How to Solve It?*, 52 SUPERVISION 6 (Apr. 1991). See also Ross H. Fishman, *When Silence is Golden; Providing Employment References*, 79 NATION'S BUS. 48 (1991) ("It is widely believed that the safest and most conservative position is to refuse to provide references."); Phillip M. Perry, *Cut Your Legal Risks When Giving References*, 13 VIDEO BUS. 46 (1993) ("Traditionally attorneys have advised business people to follow a 'no-reference' policy."); Tamar Lewin, *Boss Can Be Sued for Saying Too Much*, N.Y. TIMES, Nov. 27, 1987, at B26 ("Many employers have become so frightened of . . . lawsuits that they will no longer provide references, but will only confirm a worker's dates of employment and job title").

11. See, e.g., Alan L. Rolnick, *When Silence is Golden; Information on Dismissal of Employees*, 35 BOBBIN 87 (December 1993) ("With an ever increasing risk of being subject to liability for defamation, however, fewer and fewer employers are willing to offer more than positions held and dates of employment.").

12. See, e.g., *Employment References: Defamation and Negligent Hiring Concerns*, 279 LAB. L. REP. 1, 1-4 (CCH Jan. 1992); Celeste L. Frank, *Providing References on Employees Today*, 55 TEX. BAR J. 132 (1992) ("[E]mployers should continue to provide neutral references in the vast majority of situations . . ."). Cf. Robert A. Prentice & Brenda J. Winslett, *Employee References: Will a "No Comment" Policy Protect Employers Against Liability for Defamation?*, 25 AM. BUS. L. J. 207, 209 (1987); Paul W. Barada, *Check References with Care: Checking and Giving Employment References*, 81 NATION'S BUS. 54 (1993) ("Your lawyer's primary objective is to prevent even the slightest risk of your becoming embroiled in an expensive lawsuit claiming that what you said kept a former employee from getting a job."). But see Richard C. Reuben, *Employment Lawyers Rethink Advice*, 80 A.B.A.J. 32 (1994) ("Some management lawyers are rethinking their standard advice to give only the barest of facts when contacted for job references").

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Section stated: "We tell our clients to just confirm or deny whether the person has been employed at the business for a particular period."<sup>13</sup>

In short, empirical surveys and the overwhelming weight of lay and legal commentary on the subject seem to confirm that employers can be expected to and *are* adopting "no comment" reference strategies in response to the current legal environment, and attorneys are generally advising employers that they ought to do so.

### B. *The Damage Done by "No Comment" Policies*

The fact that significant numbers of employers are adopting "no comment" reference policies should not be of concern, unless we believe that widespread use by employers of "no comment" reference strategies has undesirable consequences. The recommendations made in this Article are based on the premise that "no comment" reference policies *do* have undesirable consequences, and that measures should be adopted to encourage employers to provide reference information more freely. While there are many arguable detriments of "no comment" policies, three negative consequences are especially significant.<sup>14</sup>

First, widespread adoption of "no comment" reference strategies restricts the flow of information that is critical to employers' abilities to make well-informed, responsible hiring (and related management) decisions. Most commentators agree that honest, detailed references from former employers are among the most useful types of information that will enable employers (1) to hire employees who are best suited for the positions for which they have applied; and (2) to learn about applicants' particular strengths and weaknesses, information that permits the employer to make early, helpful adjustments in supervisory strategies.<sup>15</sup> As one chief executive officer described the benefits

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13. Perry, *supra* note 10, at 46 (quoting Vincent J. Apruzzese).

14. There are arguably some possible benefits of "no comment" reference policies. "No comment" reference policies might permit employees who have not performed well in previous employment to secure new employment that they could not have obtained if hindered by a negative reference from a former employer. If the poor performer makes a "fresh start" and improves in the new employment, a socially positive result may be attributable at least in part to the employee's previous employer's "no comment" reference approach. As indicated by the discussion in this section, however, this article is based on the premise that the disadvantages to society of "no comment" reference policies outweigh their possible advantages.

15. Several commentators have emphasized that accurate employment reference information based on past performance is one of the best indicators of an applicant's likely future work performance. See e.g., Prentice & Winslett, *supra* note 12, at 224-25 (discussing authorities and concluding "[m]anagement experts consider contacting former employers to be one of the best methods for evaluating prospective employees. Indeed, studies show the best predictor of future job performance is not seniority or experience in similar jobs, but past job performance."); Fenton & Larimore, *supra* note 5, at 88 ("[R]esearch has shown that the more frequently an employer checks references, the less likely the employer [is] to experience employee related problems including absenteeism, tardiness, attitude, and work quality and quantity."); Kleiman & White, *supra* note 10, at 6 ("[O]ne of the most valuable methods of gathering information [to support sound hiring decisions] is reference checking."); Seymour

of reference information, "meaningful reference checks have helped us consistently hire people who thrive in our organization and rapidly become assets."<sup>16</sup> The prevalence of "no comment" reference strategies already has frustrated many employers—and will inevitably frustrate more—as they try to obtain reference information for these socially beneficial purposes.

Second, "no comment" reference policies may hurt many employees by impeding their efforts to obtain new employment, for it appears that many employers interpret a former employer's refusal to provide reference information as an implicit negative comment on the applicant involved. As one executive search firm commented, "[m]any of [our] clients assume that if the candidate's former employer does not provide a reference, the information not being given must be negative."<sup>17</sup> In this regard, the survey conducted by Paul Half International in 1992 revealed that forty-four percent of the responding executives would view a former employer's refusal to comment on an employment candidate's performance as a detriment to that candidate's application.<sup>18</sup> If employers are in fact interpreting "no comment" reference responses as implicitly negative references, many job applicants may be unfairly prejudiced in their efforts to secure new jobs.<sup>19</sup>

Third, the increasing prevalence of "no comment" reference strategies will frustrate the social purposes that have prompted the emergence and increased use of the tort of "negligent hiring," under which an employer may be held liable for the tortious acts committed by employees whom the employer hired

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Adler, *Verifying a Job Candidate's Background: The State of Practice in a Vital Human Resources Activity*, 15 REV. BUS. 3 (Dec. 22, 1993) ("[V]erification of the relevant details of an applicant's background has become a fundamental component of prudent personnel practices in the 1990's.").

16. Mark Disney, *Reference Checking to Improve Hiring Decisions*, 36 INDUS. MGMT. 3 (March/April 1994).

17. See Deborah S. Kleiner, *Is Silence Truly Golden? Employment References; Professionally Speaking*, 38 HUM. RESOURCES MAGAZINE 117 (July 1993). See also Barada, *supra* note 12, at 54 ("[I]f a former employer refuses to comment, the caller may assume it's because something is wrong with the applicant."); Kirk Johnson, *Focus on Job Recommendations: Why References Aren't Available on Request*, N.Y. TIMES, June 9, 1985, at C9 (quoting a Brooklyn attorney: "It's a new way of being damned with faint praise if all the employer does is provide a neutral reference—to say, 'yes the person worked here.'").

18. The question the executives were asked and their responses were as follows:  
Is a company's refusal to comment on an employee's performance a detriment to his or her chances of getting a job?

Responses:	
No	51%
Yes	44%
Don't Know	5%

Press Release, *supra* note 2, at 3.

19. In this regard, it is important to note that the well-informed employer will apply a reference policy *consistently* and will *not* favor particular employees by making exceptions to a generally applicable "no comment" reference policy. See *infra* notes 46-56 and accompanying text. Thus, a "no comment" reference coming from a well-informed employer could not be fairly interpreted as necessarily implying the existence of negative information about the applicant.

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without first conducting sufficient background checks.<sup>20</sup> In some respects, this last factor is a corollary of the first one discussed above, but the focus here is less on the benefits of open reference policies for employers and more on the benefits of those policies for the coworkers of hired employees and for the general public. The widespread recognition of the tort of negligent hiring may be interpreted as a social mandate that employers must exercise reasonable care to hire workers who will work safely with coworkers and members of the public. The increasing prevalence of “no comment” policies will often frustrate employers in their efforts to investigate applicants’ backgrounds in a meaningful way; the result will be the frustration of the general social safety purposes underlying the negligent hiring doctrine.<sup>21</sup>

In short, at least these three consequences seem to present compelling reasons why the increasing prevalence of “no comment” reference policies is undesirable. Part III of this Article thus proposes measures to change employers’ incentives and encourage a freer flow of reference information.

### C. *The Legal Framework Discouraging Employer References*

Recognizing the negative consequences of these restrictions in the flow of reference information, commentators have suggested a number of possible judicial or legislative reforms that might encourage employers to be more forthcoming with reference information.<sup>22</sup> One of the central premises of this paper is that employer “no comment” policies are rational responses to five critical aspects of the current employment reference environment, and that neither the current legal framework nor the reforms that have previously been proposed are likely to encourage employers to provide references more freely, because they fail in whole or in part to address the incentives created by these five aspects.

These five critical aspects of the current reference environment may be simply stated. First, the inquiring prospective employer and the public at large—rather than the employer providing the reference—realize the most tangible and immediate *benefits* of the providing employer’s open reference policy. Second, the employer who provides employment references bears almost all of the expected *costs* of an open reference policy, and neither the public nor the prospective employers who receive the reference information assist in paying these costs. Third, an employer who adopts and follows a “no comment” reference policy currently suffers almost no tangible, significant

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20. See *infra* notes 106-113 and accompanying text.

21. Even in situations where *safety* may not be a concern, the general public has interests in a free flow of reference information; most members of the public would likely applaud a freer flow of reference information if it would enable employers to more consistently hire workers who would deal with the public in a friendly, courteous and efficient manner.

22. See *infra* notes 28, 94, 117, 141, 164 and accompanying text.

detriment, largely because accepted principles of modern tort law have not been interpreted to impose an "affirmative duty" on the part of employers to respond to reference inquiries. Fourth, substantial variations and confusion in the standards governing employer liability in this context contribute to employers' difficulty in predicting the legal exposure that may result from open reference practices. Fifth, and perhaps most importantly, the "American Rule" (under which each party to litigation bears its own expenses) ensures that an employer will likely pay significant fees to attorneys if forced to defend the employer's reference practices, even if those practices are reasonable and defensible.

The first two of these five factors stem from the current allocation of costs and benefits among the actors involved. The benefits of open reference policies for the prospective employer (and to the public) seem immediate and significant. The prospective employer receiving comprehensive reference information can identify and reject applicants who will likely be unproductive or problem employees, and hire instead the applicants with the best track records of reliable performance, including courteous and safe conduct with the public.<sup>23</sup> The benefits that an employer will realize by freely *providing* reference information are more difficult to state with confidence. It is possible, for example, that Employer A, who has an open reference policy, will ultimately benefit from her largess as other employers in her market eventually reciprocate by supplying *her* with reference information that will permit Employer A to make good employment decisions.<sup>24</sup> Commentators have also suggested that adoption of an open reference policy will give employers an additional tool with which to enforce good work performance, as their employees will seek to earn and protect good reputations that will support favorable future references.<sup>25</sup>

As contrasted with the more tangible benefits immediately realized by the recipient of reference information, however, the possible benefits to the reference provider seem fairly speculative and intangible. Empirical evidence seems to confirm this assessment, as huge numbers of employers have adopted

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23. See *supra* note 15 and accompanying text. The expected result is that employers who are fortunate enough to receive good reference information will make more confident, better informed employment decisions and should, on balance, be more satisfied with their workforces.

24. See Ramona L. Paetzold & Steven L. Willborn, *Employer (Ir)rationality and the Demise of Employment References*, 30 AM. BUS. L. J. 123, 126 (1992).

25. *Id.* See also Charles D. Tiefer, Note, *Qualified Privilege to Defame Employees and Credit Applicants*, 12 HARV. C.R.-C.L. L. REV. 143, 148, 153 (1977). In a similar vein, commentators have theorized that employers may benefit from open reference policies if more competent employees "self-select" for employment with employers with open reference policies, who will presumably later serve as favorable references. See Paetzold & Willborn, *supra* note 24, at 126. Finally, employers who provide references that assist their former or departing employees may experience emotional rewards in the form of satisfaction from having helped their former employees to pursue favorable career paths. Each of these possible benefits to the employer with an open reference policy seems plausible.



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“no comment” reference policies, thus “voting with their feet” that the perceived benefits of open reference policies do not currently outweigh their perceived costs.<sup>26</sup>

The reforms proposed in this Article are based on the premise that the five factors identified above produce very strong incentives for employers to adopt “no comment” policies, and that reform proposals must recognize and address these five factors if the proposals are to succeed in encouraging a freer flow of reference information.<sup>27</sup> Before getting there, however, we need to better understand the current legal terrain governing employment references.

### II. FLAWS IN THE CURRENT LEGAL FRAMEWORK

The law governing employment references and employers’ potential liability for providing them has been reviewed extensively in existing literature.<sup>28</sup> To put in context the analysis that follows, however, it is necessary to briefly review here the most critical aspects of the pertinent legal framework. The most important factors influencing employer incentives in this context are

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26. These costs fall into two categories. The first category includes costs of gathering, verifying, and documenting information that will permit the employer both to provide accurate references to inquiring prospective employers and to defend those references if they are later challenged. See David C. Martin & Kathryn M. Bartol, *Potential Libel and Slander Issues Involving Discharged Employees*, 13 EMPLOYEE REL. L. J. 43, 59-60 (1987); see also *Employment References: Defamation and Negligent Hiring Concerns*, *supra* note 12 (interview with Paul C. Skelly, Esq., regarding employment reference practices). Many of the costs in this category are necessary even for employers who do *not* provide references, if they regularly evaluate employees and keep records of those evaluations.

As to the second category of costs, Part II will discuss at length the types of claims that may be made by a former employee who is offended by an unfavorable reference, including but not limited to claims of defamation, tortious interference with prospective contractual relations, and breach of contract. The expected costs from such claims include both potential liability and almost certain litigation expenses, including attorneys’ fees. This second category of costs may generally be avoided by the employer who chooses not to provide references.

27. In this regard, other commentators have recognized the potential efficacy of certain of the reforms that will be proposed here. See *infra* notes 28, 94, 117, 141, 164 and accompanying text. To date, however, the reforms that have been suggested have focused on and addressed only one—or sometimes two—of the five critical incentive-producing factors discussed above. This article will argue that meaningful changes in employers’ reference practices can be accomplished only if reforms are comprehensively designed to address, in at least some measure, all of these five factors and the incentives they create.

28. See John B. Lewis *et al.*, *Defamation and the Workplace: A Survey of the Law and Proposals for Reform*, 54 MO. L. REV. 797 (1989); Martin & Bartol, *supra* note 26; Paetzold & Willborn, *supra* note 24; O. Lee Reed & Jan W. Henkel, *Facilitating the Flow of Truthful Information: Some Needed Change in the Standard Required to Overcome the Privilege to Defame*, 26 AM. BUS. L.J. 305 (1988); Valerie L. Acoff, Comment, *References Available on Request . . . Not! Employers Are Being Sued for Providing Employee Job References*, 17 AM. J. TRIAL ADVOC. 755 (1994); Deborah Daniloff, Note, *Employer Defamation: Reasons and Remedies for Declining References and Chilled Communications in the Workplace*, 40 HASTINGS L. J. 687 (1989); Edward R. Horkan, Comment, *Contracting Around the Law of Employment References*, 79 VA. L. REV. 517 (1993); Kyle E. Skopic, Comment, *Potential Employer Liability for Employee References*, 21 U. RICH. L. REV. 427 (1987); Janet Swerdlow, Comment, *Negligent Referral: A Potential Theory for Employer Liability*, 64 S. CAL. L. REV. 1645 (1991).

existing statutory provisions expressly addressing employment references, statutory provisions prohibiting employment discrimination, and common law contract and tort doctrines, especially defamation.

#### A. Existing Statutory Requirements and Restrictions

The most significant statutory provisions affecting employer reference practices are currently found in three areas: (1) state "antiblacklisting" statutes, (2) state "service-letter" statutes, and (3) state and federal statutes prohibiting discrimination in employment.<sup>29</sup>

##### 1. Antiblacklisting Statutes

At the time this Article was prepared, at least thirty-two states had in place some variant of an "antiblacklisting" statute.<sup>30</sup> These statutes prohibit employers from taking certain types of action to impede the efforts of former employees and other individuals to obtain new employment. For purposes of this paper, the most important effect of these provisions is their potential to discourage the well-informed employer from adopting open reference policies.

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29. The implications of these and other types of statutes for employment references are discussed in greater detail in Skopic, *supra* note 28, at 434-43. See also KENNETH J. MCCULLOCH, TERMINATION OF EMPLOYMENT ¶¶ 20,063, 20,066 (1994) (collecting citations for state service letter statutes and antiblacklisting laws and summarizing provisions). Many states also have statutes granting employees certain rights to review their employment records. See generally *id.*, at ¶ 20,067 (collecting citations and summarizing provisions for the different states). In a very limited number of states, these types of statutes include provisions that may restrict an employer's ability to release certain types of reference information to an inquiring prospective employer without first notifying the employee who is the subject of the inquiry. See, e.g., MICH. COMP. LAWS ANN. §§ 423.501-.512 (West Supp. 1994); ILL. REV. STAT. ch. 820 §§ 40/1 - 40/13 (1993) (held unconstitutional in *Spinelli v. Immanuel Lutheran Evan. Cong.*, 515 N.E.2d 1222 (Ill. 1987)). Because so few states have these types of restrictions, this article does not address these personnel records statutes other than by noting here that legislatures in states that have these types of provisions may have to address them as part of any legislative effort to encourage employers to give references more freely.

30. See ALA. CODE § 13A-11-123 (West 1994); ARIZ. CONST. art. XVIII § 9 and ARIZ. REV. STAT. ANN. §§ 23-1361, 23-1362 (1995); ARK. CODE ANN. § 11-3-202 (1987); CAL. LAB. CODE §§ 1050, 1052-54 (West 1989); COLO. REV. STAT. ANN. §§ 8-2-110 - 8-2-115, 8-3-108(1)(k) (West 1994); CONN. GEN. STAT. ANN. §§ 31-51, 31-105(2), 31-105(9), 31-134 (1995); FLA. STAT. ANN. § 448.045 (1984 & Supp. 1993); HAW. REV. STAT. § 377-6(11) (Michie 1994); IND. CODE ANN. §§ 22-5-3-1, 22-5-3-2, 25-16-1-14 (Burns 1992); IOWA CODE ANN. §§ 730.1-730.3 (1993); KAN. STAT. ANN. §§ 44-117 - 44-119 (1993); LA. REV. STAT. § 23-963 (1985 & Supp. 1995); ME. REV. STAT. ANN. tit. 17, § 401 and tit. 26 § 979-C (West 1988 & Supp. 1994); MINN. STAT. ANN. §§ 179.12(6), 179.60 (West 1993); MISS. CODE §§ 77-9-725, 77-9-727 (1989); MONT. CODE ANN. §§ 39-2-801 - 39-2-804 (1993); NEV. REV. STAT. ANN. §§ 613.200, 613.210 (Michie 1995); N.H. REV. STAT. ANN. § 273-C:6 (1987 & Supp. 1994); N.M. STAT. ANN. § 30-13-3 (Michie 1994); N.Y. LAB. LAW § 704 subd. 2, subd. 9 (Consol. 1983); N.Y. EXEC. LAW § 296 subd. 13 (Consol. 1983); N.C. GEN. STAT. § 14-355, 14-356 (1993); N.D. CENT. CODE § 34-01-06 (Michie 1987); N.D. CONST. ART. XII § 17; OHIO REV. CODE ANN. § 1331.02 (Anderson 1993); OKLA. STAT. ANN. tit. 40, §§ 171, 172 (West 1986); OR. REV. STAT. § 659.230, 659.240 (1993); R.I. GEN. STAT. § 28-7-13(2), (9) (1993); TENN. CODE ANN. § 50-1-202 (1991); TEX. LAB. CODE ANN. §§ 52.031 (West 1994), TEX. REV. CIV. STAT. ANN. arts. 5196, 5206 (West 1994); UTAH CODE ANN. §§ 34-24-1, 34-24-2 (1994); UTAH CONST. ART. XII, §19, ART. XVI, §4; VA. CODE ANN. § 40.1-27 (Michie 1994); WASH. REV. CODE ANN. § 49.44.010 (West 1990); WISC. STAT. ANN. §§ 134.02, 111.06(1)(k) (West 1992).

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Most of the antiblacklisting statutes currently in force were enacted in the late nineteenth or early twentieth century. As one commentator described the impetus for the antiblacklisting provisions, "[t]hese statutes were enacted . . . because employers, in an effort to quash labor organization, created and circulated lists of pro-union workers to prevent them from gaining employment."<sup>31</sup> To address this concern, the statutes established that these lists, called "blacklists," are illegal.<sup>32</sup>

While the purposes motivating these statutes may have been relatively circumscribed, the language used in the provisions often was not. Thus, the typical antiblacklisting statute establishes criminal penalties for an employer who "conspires" or "contrives" to prevent a discharged employee from obtaining new employment. A significant number of these statutes declare that "blacklisting" is illegal, without defining what conduct by the employer constitutes blacklisting.

Utah's antiblacklisting statute provides a good example of the typical language and structure of these statutes. Utah's provision states:

No person shall blacklist or publish, or cause to be published or blacklisted, any employee discharged or voluntarily leaving the service of any person, company or corporation with intent and for the purpose of preventing such employee from engaging in or securing similar or other employment from any other person, company or corporation.<sup>33</sup>

Section 34-24-1 must be read in conjunction with Section 34-24-2, entitled "Violation—Penalty," which states:

If any person blacklists or publishes, or causes to be blacklisted or published, any employee discharged by any corporation, company or individual, with the intent and for the purpose of preventing such employee from engaging in or securing similar or other employment from any other corporation, company or individual, *or shall in any manner conspire or contrive by correspondence or otherwise to prevent such discharged employee from securing employment*, such person is guilty of a felony and shall be fined not less than \$55 nor more than \$1000 and imprisoned in the state prison not less than sixty days nor more than one year.<sup>34</sup>

Certain language in Section 34-24-2, highlighted in the preceding paragraph, appears broad enough to prohibit an unfavorable employment reference. Specifically, an employer might be found to have "contrive[d] . . . to prevent [a] discharged employee from securing employment" if the employer provided a reference that was unfavorable enough to discourage a prospective

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31. Mark A. Rothstein, *Wrongful Refusal to Hire: Attacking the Other Half of the Employment-at-Will Rule*, 24 CONN. L. REV. 97, 110 (1991). See also WILLIAM J. HOLLOWAY & MICHAEL J. LEECH, *EMPLOYMENT TERMINATION: RIGHTS AND REMEDIES* 246-47 (1985) ("[B]lacklisting was originally associated with employer opposition to labor unions, and was a means of preventing possible union adherents from getting into the work place.").

32. In some states, violation of the antiblacklisting provision is a misdemeanor; in others, violation is a felony.

33. UTAH CODE ANN. § 34-24-1 (Michie 1988).

34. UTAH CODE ANN. § 34-24-2 (Michie 1988) (emphasis added). See also UTAH CONST., art. XII, § 19; art. XVI, § 4 (forbidding blacklisting).

new employer from hiring the applicant to whom the reference related. If this interpretation of Section 34-24-2 is plausible, an employer providing a negative employment reference in Utah at least theoretically risks a felony conviction.<sup>35</sup> Many of the other states' antiblacklisting provisions include similarly broad language and thus pose similar risks for the employer who responds to a reference inquiry.

It does not seem plausible that state legislatures in enacting the antiblacklisting statutes intended to prohibit former employers from providing accurate information in a good-faith response to a reference request, even if that information were unfavorable and might discourage the inquiring prospective employer from hiring the applicant to whom the reference relates.<sup>36</sup> Indeed, a majority of the states with antiblacklisting statutes in force have recognized the potential for the provisions to discourage employers from providing reference information and have expressly exempted employment references from the coverage of the antiblacklisting provisions. Arizona's antiblacklisting statute, for example, establishes that "blacklisting" is illegal but also provides in pertinent part: "It is not unlawful for a former employer to provide to a requesting employer, or agents acting in his behalf, information concerning a person's education, training, experience, qualifications, and job performance to be used for the purpose of evaluating the person for employment."<sup>37</sup>

For purposes of this paper, two points concerning the antiblacklisting statutes are most significant. First, while many states have clarified that their antiblacklisting statutes do not prohibit employment references, *not all states have done so*.<sup>38</sup> Second, even in states that have exempted employment references from the coverage of the antiblacklisting statute, the antiblacklisting provisions generally do not impose any affirmative duty on an employer to provide an employment reference when asked for one. These two factors may—or at least should—discourage a cautious and well-informed employer from responding to a reference inquiry, particularly if that inquiry originated

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35. Even if criminal prosecution and conviction are unlikely under these circumstances, the antiblacklisting statutes may provide a basis for, or otherwise support, a civil suit by the individual who was the subject of the negative reference. *Compare* Worden v. Provo City, 806 F. Supp. 1512, 1516-17 (D. Utah 1992) (describing circumstances under which plaintiff may prevail in claim for damages based on violation of Utah's antiblacklisting provision) with *Richards Irrigation Co. v. Karren*, 880 P.2d 6, 11 (Utah Ct. App. 1994) (Utah's constitutional and statutory antiblacklisting provisions in combination establish criminal penalties for violations, but do not provide a private cause of action).

36. Most states, including Utah, do not have readily available legislative history materials that would indicate whether legislators considered the possible chilling effect on employment references at the time that they enacted the antiblacklisting provisions.

37. ARIZ. REV. STAT. ANN. § 23-1361.B (West Supp. 1994). Other states that have clarified in their antiblacklisting provisions that the provisions are not intended to prohibit employment references include California, Colorado, Connecticut, Indiana, Iowa, Kansas, Montana, Nevada, New Mexico, North Carolina, Texas, Virginia, and Wisconsin. The citations for these states' antiblacklisting provisions are included *supra* note 30.

38. The model legislation proposed in Part IV includes statutory language by which states that have not yet done so may exempt employment references from the reach of an antiblacklisting statute.

## Laws Governing Employment References

in an unfamiliar jurisdiction.

### 2. *Service-Letter Statutes*

At the time this Article was prepared, at least thirteen states had enacted some type of "service-letter" statute.<sup>39</sup> The "service-letter" statutes generally grant discharged employees the right to receive from their former employers written confirmation, often called a "service-letter," documenting certain aspects of their employment.<sup>40</sup> The "service-letter" required by these statutes typically will encompass at least some of the information generally included in an employment reference.

The language of the service-letter statutes varies considerably from state to state. Some states' service-letter statutes simply entitle a discharged employee, upon written request, to receive a written statement from the employer of the reasons the employee was discharged.<sup>41</sup> Other states do not require the employer to state the reasons for discharge but do require the employer to verify in writing the nature and duration of the service-letter requester's employment.<sup>42</sup>

Because of the variations in the language of these service-letter statutes, no one statute can fairly be described as "typical." Perhaps the most fairly

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39. See CAL. LABOR CODE § 1055 (West 1993) (public utility corporations required to give discharged employee service letter, upon request); IND. CODE ANN. § 22-6-3-1 (Burns 1992) (discharged employee entitled, upon request, to service letter); KAN. STAT. ANN. § 44-808 (1993) (discharged employee entitled, upon request, to service letter); ME. REV. STAT. ANN. tit. 26, § 630 (West 1988) (employee entitled, upon request, to written statement of reasons for termination of employment); MINN. STAT. ANN. § 181.933 (West 1993) (employee entitled, upon request, to written statement of reasons for termination of employment); MO. ANN. STAT. § 290.140 (Vernon 1993) (employee entitled, upon written request, to letter setting forth nature, character and duration of service and stating cause for termination); MONT. CODE ANN. § 39-2-801 (1993) (employee, on demand, to be furnished with written state of reason for discharge); NEB. REV. STAT. § 48-209-211 (1993) (employees of public service corporations or contractors of public service corporations, upon request entitled to letter stating nature and duration of service and reason for discharge); NEV. REV. STAT. ANN. § 613.210(4) (Michie 1995) (discharged employee may receive truthful statement of reasons for discharge); OHIO REV. CODE ANN. § 4973.03 (Baldwin 1994) (railroad employees entitled, on demand, to written statement of reason for discharge); OKLA. STAT. ANN. § 171 (1986) (employees of public service corporations or contractors of public service corporations, upon request, entitled to letter stating nature and duration of service and reason for discharge); TEX. REV. CIV. STAT. ANN. arts. 5196, 5196f, 5206 (1987) (detailing various requirements for written statements of nature of service and reasons for discharge, on demand by employee, (§ 3 of art. 5196 found unconstitutional in *Saint Louis Southwestern Ry. v. Griffin*, 171 S.W. 703 (Tex. 1914)); WASH. ADMIN. CODE § 296-126-050 (1994) (discharged employee, upon request, entitled to service letter setting forth reasons for discharge). The reader's comparison of this note and note 30 will reveal that many of the states that have service-letter statutes also have separate antiblacklisting provisions as discussed in the preceding section.

40. For historical information concerning the impetus and development of the service-letter statutes, see HOLLOWAY & LEECH, *supra* note 31, at 247-48.

41. See, e.g., MINN. STAT. ANN. § 181.933 (West 1993).

42. See, e.g., KAN. STAT. ANN. § 44-808 (1993):

It shall be unlawful for any employer . . . (3) To refuse to furnish, upon written request of any employee whose services have been terminated, a service letter setting forth the tenure of employment, occupational classification and wage rate paid the employee.

representative of the provisions is Indiana's service-letter statute, which states:

Whenever any employee of any person, firm, limited liability company, or corporation doing business in this state shall be discharged or voluntarily quits the service of such person, firm, limited liability company, or corporation, it shall be the duty of such person, firm, member or manager of the limited liability company, or the officer of the corporation having jurisdiction over such employee, upon written request of such employee, to issue such employee a letter, duly signed by such person, firm, member, manager, or officer, setting forth the nature and character of service rendered by such employee and the duration thereof, and truly stating for what cause, if any, such employee has quit or been discharged from such service; however, this section shall not apply to any person, firm, limited liability company, or corporation which does not require written recommendations or written applications showing qualifications or experience for employment.<sup>43</sup>

Certain aspects of Indiana's service-letter statute recur in similar form in many other states' statutes. The most typical recurring features are: (1) the former employee must submit a *written* request in order to receive the service-letter contemplated by the statute; and (2) the statute does not grant anyone other than the former employee the right to receive information relating to the employee's former service.

For present purposes, three of the points discussed above concerning the service-letter statutes are most important. First, the service-letter statutes vary considerably from state to state in terms of how much information they require an employer to provide. While a few service-letter statutes require former employers to give former employees service-letters that are detailed enough to constitute a fairly comprehensive reference, other statutes require the employer to provide only minimal information that—standing alone—will not be very useful as an employment reference. Second, most current service-letter statutes grant the right to a service-letter only to the discharged employee, and not to a prospective employer seeking information about an applicant's prior work history.<sup>44</sup> This difference is likely to decrease the candor of the letter, diminishing its usefulness to both the prospective employer and the prospective employee. Third, and most significant, only a minority of the states have enacted *any* type of service-letter statute. For these three reasons, the service-letter statutes, like other aspects of the current legal framework, do not provide satisfactory incentives for, or guarantees of, a free flow of reference information.<sup>45</sup>

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43. IND. CODE ANN. § 22-6-3-1 (Michie Supp. 1994).

44. Obviously, an employee entitled by statute to a service letter may choose to make that service letter available to a prospective new employer. The salient point is that existing service-letter statutes do not provide prospective employers with any *entitlement* to receive detailed reference information about an applicant from the applicant's former employer.

45. Despite the described limitations on the value of service letters, they do serve a useful function in providing the bare minimum of relevant information about a prospective employee. Enacting a service-letter statute might be a good first step for a state that chose not to immediately adopt this article's comprehensive legislative proposal, set out in Part IV.

## Laws Governing Employment References

### 3. Antidiscrimination Laws

A host of federal and state laws prohibit employment discrimination.<sup>46</sup> With regard to employment reference practices, these laws are most likely to affect employers in two ways: (1) by subjecting employers to potential liability for reference practices that discriminate on the basis of a current or former employee's race or sex or some other suspect characteristic; and (2) by subjecting employers to potential liability if the employer gives a negative employment reference in an effort to retaliate against a current or former employee who has engaged in conduct protected by the antidiscrimination laws (e.g., filing a complaint or assisting another individual who has filed a complaint).

Employer liability for discriminatory reference practices will most likely be predicated upon provisions prohibiting discrimination in the terms, conditions, and privileges of employment. Title VII of the Civil Rights Act of 1964 provides a useful example of typical statutory language outlawing this type of discrimination in employment.<sup>47</sup> Section 703(a) of Title VII provides in pertinent part that "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or *privileges of employment*, because of such individual's race, color, religion, sex, or national origin."<sup>48</sup>

The highlighted language from Section 703(a) has been interpreted to prohibit employers from discriminating against current and former employees on the basis of race, color, religion, sex or national origin when designing or applying reference policies.<sup>49</sup> In 1978, for example, the United States Court of Appeals for the District of Columbia Circuit considered a woman's claim

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46. These laws generally prohibit employers from discriminating on the basis of certain employee characteristics when making decisions with respect to compensation, terms, conditions and privileges of employment. Prohibited bases for discriminating between or among employees include, among other characteristics, race, color, religion, sex, national origin, and actual or perceived disabilities. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 to 2000e-17 (1988 & Supp. 1992) (prohibiting discrimination on basis of race, color, religion, sex or national origin); Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (1988 & Supp. 1993) (prohibiting discrimination because of age against any person who is at least 40 years old); Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq.* (Supp. 1992) (prohibiting discrimination against qualified persons with disabilities). *See also* MCCULLOCH, *supra* note 29, ¶¶ 20,011-20,039 (collecting citations and summarizing state antidiscrimination laws).

47. Title VII has been so instrumental in the development of antidiscrimination principles that it has been described as a "legal watershed" and "the first comprehensive national attack on the problem of employment discrimination." CHARLES A. SULLIVAN ET AL., *EMPLOYMENT DISCRIMINATION* 1-2 (1988).

48. Section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1)(1988) (emphasis added).

49. *See* Kurtis A. Kemper, Annotation, *Dissemination of Adverse Employment References by Former Employer as Unlawful Employment Practice Under Title VII of Civil Rights Act of 1964* (42 U.S.C.S. § 2000(e)-2(a)(1)), 50 A.L.R. FED. 722 (1980).

that her former employer violated Title VII by giving a false, derogatory reference to her prospective new employer; the plaintiff asserted that the former employer gave this negative reference with the intent to discriminate against her because of her sex and her husband's Arabic descent.<sup>50</sup> With regard to the plaintiff's claim that the allegedly discriminatory reference violated Title VII, the D.C. Circuit concluded:

A former employer is solidly in position to impede a prior employee's reentry into the job market. When that influence is exerted to limit employment opportunities on grounds of "race, color, religion, sex, or national origin," [footnote omitted] an evil at which Section 703(a)(1) is unequivocally aimed materializes. . . . The practice alleged [, i.e., false, adverse references motivated by a discriminatory intent,] erects artificial barriers that Congress endeavored to foreclose and, we hold, is outlawed by Section 703(a).[Footnote omitted]<sup>51</sup>

Other courts have joined the D.C. Circuit in concluding that employers may violate Title VII by designing or implementing reference practices in a fashion that discriminates against current or former employees on a prohibited basis.<sup>52</sup>

Employers may also be liable under the antidiscrimination laws if they provide a negative employment reference to an inquiring prospective employer in an attempt to retaliate against a current or former employee who has engaged in conduct protected by the antidiscrimination laws.<sup>53</sup> Again, Title VII provides an excellent example of the antiretaliation provisions typically found in many civil rights laws. Section 704(a) of Title VII provides in pertinent part, "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."<sup>54</sup> This language from section 704(a) has been interpreted to apply to and prohibit an adverse employment reference that is motivated by a retaliatory animus.<sup>55</sup>

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50. *Shehadeh v. Chesapeake & Potomac Tel. Co. of Md.*, 595 F.2d 711 (D.C. Cir. 1978).

51. *Id.* at 722-23.

52. *See, e.g., Bailey v. USX Corp.*, 850 F.2d 1506 (11th Cir. 1988); *Pantchenko v. C.B. Dolge Co.*, 581 F.2d 1052 (2d Cir. 1978). The courts have not been unanimous in reaching this conclusion. *See e.g., Reed v. Shephard*, 939 F.2d 484, 492-93 (7th Cir. 1991) (Title VII does not protect former employees from postemployment discrimination).

53. *See Patricia A. Moore, Note, Parting Is Such Sweet Sorrow: The Application of Title VII to Post-Employment Retaliation*, 62 FORDHAM L. REV. 205 (1993).

54. Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e-3(a) (1988).

55. *See* EEOC Compl. Man. § 614.7(f)(1) at 161 (BNA 1988) (employer violates Civil Rights Act of 1964, § 704(a) by issuing "unwarranted, unfavorable letters of recommendation" in retaliation for former employee's opposition to employer's inadequate equal employment opportunity practices). *See also Pantchenko v. C.B. Dolge Co.*, 581 F.2d 1052 (2d Cir. 1978) (employer violates Title VII by refusing to provide postemployment reference letters in retaliation for employee's filing charges with EEOC). *But see Moore, supra* note 53, at 205-06 (collecting and discussing cases in which several courts have concluded that Title VII protects only current and not former employees and thus does not cover post-employment retaliatory references).



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For purposes of this Article, two points concerning these antidiscrimination laws are especially important. The first point is that nothing in the antidiscrimination laws compels employers to adopt or reject any particular type of reference strategy, whether an open reference policy or a “no comment” policy; these laws require only that the policy adopted be designed and applied in a nondiscriminatory fashion. The second and more important point—really a corollary of the first—is that the employer who adopts a “no comment” reference policy had better follow that policy uniformly, for inconsistent adherence to the policy may result in claims that the employer has treated employees disparately in violation of the antidiscrimination laws.<sup>56</sup>

### B. *Common Law Protections and Restrictions*

Several common law doctrines have important implications for employment reference practices; these doctrines generally have more practical effect in this context than do the statutory provisions discussed in the preceding section. The common law doctrines with the most important repercussions for employment reference practices fall under the rubrics of contracts and torts.

#### 1. *Contracts and Reference Practices.*

There are two principal means by which common law contract doctrines may affect an employer’s reference practices: (a) An employer and a current or former employee may agree to contractual terms requiring the employer to follow a particular approach in providing future references; and (b) current or former employees may have a contractual right to require the employer to follow reference practices discussed by the employer in an employee handbook or personnel policies.

a. *Individual reference contracts* An individual employee can reach an agreement with his or her employer as to the reference practices the employer will follow in the future with respect to that employee. These reference agreements may arise at the onset of the individual’s employment, during the individual’s tenure, or at the time the employment relationship is terminating.

At the time an employee is first hired, the employee and the employer may enter into a contract detailing certain incidents of the employment relationship. Incidents that may be contractually fixed include, but are not limited to, the planned duration of the employment, salary, work hours and responsibilities, and employment benefits and privileges.<sup>57</sup> While not commonly addressed in an initial employment contract, future reference practices may be detailed. An

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56. See William A. Hancock, *Liability for Employment References*, 4 CORP. COUNS. Q. 1, 3 (Oct. 1988).

57. See ALFRED G. FELIU, *PRIMER ON INDIVIDUAL EMPLOYMENT RIGHTS* 9 (1992).

employer might, for example, represent orally or in writing to a prospective employee that the employer will later assist the employee in finding subsequent employment and will provide favorable references, so long as the employee has performed satisfactorily. These types of representations by the employer may give rise to contractual entitlements that the employee may later enforce.<sup>58</sup>

Even if reference strategies were not discussed and agreed upon at the time an employee is first hired, events during the employee's tenure may result in a current or former employee having a contractual entitlement to particular reference practices. Thus, for example, an employer might promise future favorable references as one component of an attempt to induce an employee to extend his or her tenure beyond the initially agreed term. The employee's performance of the extended employment may constitute sufficient consideration to permit the employee to enforce the employer's promise to provide favorable references.<sup>59</sup>

Finally, and perhaps most common, an employer and an employee may reach an enforceable agreement as to post-employment reference practices in connection with the termination of the employment relationship. Specifically, in an effort to avoid litigation over the termination of an individual's employment, employers often negotiate severance agreements with the employee who is resigning or being discharged.<sup>60</sup> Typical severance agreements include provisions detailing severance payments made to the employee by the employer and the employee's release of the employer from any claims arising from the termination of employment.<sup>61</sup> These types of severance agreements may also include provisions setting forth the nature of any post-employment reference the employer will provide and the procedures the

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58. See *id.* at 34 ("[s]tatements or promises made by an employer's representative in an interview may constitute enforceable terms of the employment relationship, whether or not the employer so intended"); cf. *Yaris v. Arnot-Ogden Memorial Hosp.*, 891 F.2d 51 (2d Cir. 1989) (employer's oral promise that job interviewee would have "a position for life if [he could] do the job" may give rise to enforceable contract). State statutes of frauds impose requirements that particular types of contracts be in writing and thus may preclude enforcement of some of these promises, if the promises were made only orally. *FELIU*, *supra* note 57, at 23-25.

59. Cf. *Pine River State Bank v. Mettile*, 333 N.W.2d 622, 627 (Minn. 1983) (employee's continuation in employment may provide consideration to support enforcement of employer's promise made subsequent to employee's commencement of employment); *Minyard v. Daking Mill*, 599 S.W.2d 742 (Ark. 1980) (employee's actions in giving up another job opportunity and remaining available to perform services may provide sufficient consideration to support enforcement of employer's promise of job security). See generally *HOLLOWAY & LEECH*, *supra* note 31, at 49 (foregoing another job opportunity and longevity of service may constitute consideration sufficient to permit employee to enforce promises made by employer to induce employee to extend employment relationship); *HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW & PRACTICE* §4.37, at 338 (3d ed. 1992) (discussing bargained-for conduct and continuing employment as consideration to support enforcement of employer promises).

60. See *Bennett W. Root, Jr., Terms of Termination: Resolving the Issues*, in *THE EMPLOYEE TERMINATION HANDBOOK*, 269 (Jeffrey G. Allen ed., 1986); see also *Fraser Younson, Severance Agreements*, in *EMPLOYMENT LAW HANDBOOK* 563 (Fraser Younson et al. eds., 1987) (discussing severance agreements in Great Britain).

61. *Root*, *supra* note 60, at 286.

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employer will follow in responding to reference inquiries.<sup>62</sup> In this context, the employee's agreement not to litigate any potential claims arising from the termination generally will constitute sufficient consideration to support the reference agreement, and the employer will be contractually bound to follow the agreed reference strategy.<sup>63</sup>

b. *Employee handbooks and personnel policies.* Reference practices may also be addressed in an employer's personnel policies or employee handbook. Current and former employees may have a contractual right to require the employer to follow the reference practices discussed in these types of documents.

Many employers prepare written personnel policies or employee handbooks that are given to employees at the onset or during the course of the employment relationship. These written policies typically describe employee benefits and privileges, grievance and discipline procedures, and other rules relating to employees' rights and responsibilities. In many states, these written statements of employment policies have been interpreted as giving rise to contract rights for the employees to whom they have been distributed.<sup>64</sup>

These types of personnel policies or employee handbooks may contain descriptions of an employer's policies respecting post-employment references.<sup>65</sup> For example, a personnel policy or employee handbook may recite the employer's willingness to assist departing employees in pursuing and securing desirable new employment, if the employees have performed satisfactorily during their tenure. Where the employer has made these types of representations, current or former employees may later be entitled to enforce them as contractual commitments.<sup>66</sup>

For purposes of this Article, the most critical insight concerning the different types of reference practice contracts discussed above, no matter how they may have arisen, is that they are not in any way *systematically* encouraged

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62. Younson, *supra* note 60, at 569. This agreed reference is sometimes in the form of a reference letter prepared by the employer and reviewed and approved by the employee.

63. Cf. Root, *supra* note 60, at 286-88.

64. See, e.g., Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880 (Mich. 1980); see also Anthony T. Oliver, Jr. & Bruce D. May, *Employer Rules and Policies: Binding Contracts?*, in THE EMPLOYEE TERMINATION HANDBOOK, *supra* note 60, at 91; HOLLOWAY & LEECH, *supra* note 31, at 86-89 (both analyzing circumstances in which employer rules have been found contractually binding).

65. In a unionized workplace, the employer's reference practices could also conceivably be a subject of collective bargaining. Any agreement on reference practices reached by collective bargaining would then be included in the collective bargaining agreement and would be enforceable as a contractual obligation. However, the author's research has not identified any case in which collective bargaining over reference practices was discussed nor any example of a collective bargaining agreement in which reference practices were detailed.

66. Cf. Pine River State Bank v. Mettile, 333 N.W.2d 622 (Minn. 1983) (employee permitted to enforce, as contractual obligation, employer's statement in employee handbook pertaining to progressive disciplinary procedures employer intended to follow).

or required, but appear only erratically. Thus, like other elements of the current legal framework, the contractual aspects do not constitute a significant factor encouraging a free flow of reference information.

## 2. *Tort Law (Other than Defamation) and Reference Practices*

The most important common law doctrine affecting employer reference practices is the tort of defamation, which will be discussed in detail below in Part II.B.3. Several other tort doctrines, however, also play a reasonably significant role in the legal framework governing the employment reference context. These other tort doctrines include intentional interference with prospective economic advantage, and the complementary doctrines of nondisclosure and misrepresentation.

a. *Intentional interference with prospective economic advantage.* A prospective new employer who receives an unfavorable employment reference from a job applicant's current or former employer very often will decide not to hire that applicant. If the former employer included false information in the negative reference and acted with "improper" motives, the applicant may be entitled to damages under the tort doctrine of intentional interference with prospective contractual relation, also sometimes called "intentional interference with prospective economic advantage."

The Restatement (Second) of Torts describes the elements of this tort as follows:

### § 766B. INTENTIONAL INTERFERENCE WITH PROSPECTIVE CONTRACTUAL RELATION

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of

(a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or

(b) preventing the other from acquiring or continuing the prospective relation.<sup>67</sup>

Section 766B indicates that the former employer who has interfered with a job applicant's prospective relationship with a new employer by giving a negative reference will not generally be liable under this tort unless the former employer's interference was both "improper" and "intentional."<sup>68</sup> Section 767

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67. RESTATEMENT (SECOND) OF TORTS § 766B (1977).

68. It is also possible, although much less likely, for an actor to be liable where the actor has negligently interfered with another's prospective contractual relation but has not acted with ill will and intention to interfere. Compare Skopic, *supra* note 28, at 445 (collecting and discussing cases in which liability was based on negligent dissemination of adverse information which interfered with a prospective employment relationship) with W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 130, at 1008 (5th ed. 1984) (hereinafter "PROSSER") (collecting cases in which liability was rejected and concluding "[c]ases have been quite infrequent in which even the claim has been advanced that the

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of the Restatement lists factors that may be pertinent in determining whether interference is improper, including, but not limited to, the interfering actor's motive, the interests the actor has sought to advance, the relations between the parties, and "the social interests in protecting the freedom of the actor and the contractual interests of the other."<sup>69</sup> The Restatement's list of these factors suggests that an employer who provides an unfavorable job reference will not likely be found liable under this tort theory unless the negative reference was both false in material respects *and* motivated by some degree of ill will or malice.<sup>70</sup>

In this last regard, the employer who provides a response to a request for an employment reference is protected from liability under this tort by a *privilege* very much like the qualified privilege that partially insulates employers from liability under a defamation theory when they have published unfavorable reference information.<sup>71</sup> As Prosser and Keeton's hornbook describes this privilege, "[i]n general, it may be said that any purpose sufficient to create a privilege to disturb existing contractual relations, such as the disinterested protection of the interests of third persons, or those of the public . . . will also justify interference with relations which are merely prospective."<sup>72</sup>

In short, an employer who gives an unfavorable employment reference that is substantially true or—if false in material respects—that is *not* motivated by ill will, malice or other improper motives will likely avoid liability under this tort theory. On the other hand, the employer who gives a false reference with a malicious intent to hamper a current or former employee from securing new employment may be liable under this tort theory to the applicant whose prospects are damaged by the unfavorable reference.<sup>73</sup>

b. *Nondisclosure and misrepresentation.* Several complementary tort

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defendant through his negligence has prevented the plaintiff from obtaining a prospective pecuniary advantage; and the usual statement is that there can be no cause of action in such a case") (footnote omitted) *and* RESTATEMENT (SECOND) OF TORTS § 766C(a) (1977) ("One is not liable to another for pecuniary harm not deriving from physical harm to the other, if that harm results from the actor's negligently causing a third person not to perform a contract with the other").

69. RESTATEMENT (SECOND) OF TORTS § 767 (1977).

70. *Cf. Id.*

§ 772. ADVICE AS PROPER OR IMPROPER INTERFERENCE

One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person

(a) truthful information, or

(b) honest advice within the scope of a request for the advice.

71. See discussion *infra* notes 94-105 and accompanying text.

72. PROSSER, *supra* note 68, § 130, at 1010-11 (footnotes omitted).

73. See, e.g., *Sigal Const. v. Stanbury*, 586 A.2d 1204 (D.C. 1991) (terminated employee recovered damages from former employer under theory of tortious interference with contractual relation after former employer's false, negative reference caused employee to lose job prospect).

doctrines often discussed under the headings "nondisclosure," "affirmative duty," and "misrepresentation" have important implications for employment reference practices. Judicial interpretations of these related doctrines support two general conclusions: (1) Under current law, an employer generally has no affirmative duty to respond to a reference inquiry and may decline to disclose unfavorable information about an applicant to an inquiring prospective employer, at least so long as the employer does not provide *other* types of reference information; and (2) the employer who *does* choose to respond to a reference inquiry risks potential liability for misrepresentation if the employer negligently or intentionally omits material information about an applicant's unfavorable characteristics.

The absence of an affirmative duty to respond to reference inquiries stems from our tort law's reluctance to impose an affirmative duty on individuals to take positive action to protect others.<sup>74</sup> As described in Restatement (Second) of Torts, "[t]he fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose on him a duty to take such action."<sup>75</sup> The Restatement offers the following illustration of this principle:

A sees B, a blind man, about to step into the street in front of an approaching automobile. A could prevent B from so doing by a word or touch without delaying his own progress. A does not do so, and B is run over and hurt. A is under no duty to prevent B from stepping into the street, and is not liable to B.<sup>76</sup>

In the employment reference context, application of this basic tenet suggests—and some courts have concluded—that an employer has no duty to respond to a reference inquiry from an applicant's prospective employer and disclose the applicant's unfavorable characteristics, even if those unfavorable characteristics suggest potential danger. A case decided in Michigan in 1990, for example, involved an individual who was savagely beaten and murdered by a maintenance employee who worked at the same site where the victim worked; the maintenance employee had a long history of violent behavior and discipline problems at his previous job. The murder victim's estate sought damages from the maintenance worker's former employer, claiming that the employer was negligent in failing to disclose to the maintenance company that employed the aggressor that the aggressor had a history of violent conduct, with the result

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74. In certain circumstances, the existence of a "special relationship" between the persons involved may trigger an affirmative duty to act. See discussion *infra* notes 147-149 and accompanying text.

75. RESTATEMENT (SECOND) OF TORTS § 314 (1977). See also PROSSER, *supra* note 68, § 56, at 375 ("the law has persistently refused to impose on a stranger the moral obligation to go to the aid of another human being who is in danger, even if the other is in danger of losing his life"). This basic tenet of tort law has been described as a reluctance to impose liability on individuals for their "nonfeasance," as contrasted with their "misfeasance." *Id.* at 373-74; see also Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 251-60, reprinted in A TORTS ANTHOLOGY 126, 128-31 (Lawrence C. Levine et al. eds., 1993).

76. RESTATEMENT (SECOND) OF TORTS § 314 cmt. c, illus. 1 (1977).

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that the maintenance company hired him and placed him in a position where he was able to attack the victim. The Court of Appeals of Michigan agreed with the lower court's conclusion that the former employer had no duty to warn the prospective new employer of the applicant's dangerous proclivities. In explaining its decision, the court stated:

[W]e conclude that a former employer has no duty to disclose malefic information about a former employee to the former employee's prospective employer. Although we agree with the trial court that in today's society, with increased instances of child abuse and other types of violence directed towards readily identifiable classes of people, we may have reached a point where people should make this type of information known, we restate our belief that this is a substantive change in our law, the type of change best left to our Legislature.<sup>77</sup>

While cases like *Moore* suggest that an employer may not generally have a duty to respond to a reference inquiry and disclose a former employer's dangerous tendencies, the employer who *does* provide some employment reference information risks liability if the employer omits material negative information from the reference that is given. Again, this conclusion stems from a basic tenet of the common law of torts, succinctly stated in Restatement (Second) of Torts § 323:

### § 323. NEGLIGENCE IN PERFORMANCE OF UNDERTAKING TO RENDER SERVICES

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.<sup>78</sup>

Section 323 is readily applied to the employment reference context.

Consider, for example, the following hypothetical:

Employer A has employed Worker B for several years and knows that Worker B has constantly been in trouble at work and has repeatedly engaged in violent behavior toward his coworkers. Employer A fires Worker B, who then applies for a position with Employer C. When Employer C calls Employer A for a reference, Employer A gives a relatively neutral appraisal of Worker B, omitting any specific information about Worker B's discipline problems and violent conduct.<sup>79</sup> Relying

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77. *Moore v. St. Joseph Nursing Home, Inc.*, 459 N.W.2d 100, 103 (Mich. App. 1990). The defendant in *Moore* asserted that it had never been contacted by the maintenance company that hired the assaultive employee, but conceded that it would not have provided information, other than the employee's dates of employment, if it had been contacted for a reference. *Id.* at 102. See also *Cohen v. Wales*, 518 N.Y.S.2d 633 (N.Y. App. Div. 1987) (former employer, a school district, when recommending former employee for position as grammar school teacher, had no duty to warn prospective new employer that former employee had been charged with sexual misconduct). Cf. *Francioni v. Rault*, 518 So.2d 1175 (La. App. 4th Cir. 1988) (Even if contacted for reference, former employer thus was not liable under a wrongful death theory for former employer's failure to warn, when former employee murdered coemployee at his new job).

78. RESTATEMENT (SECOND) OF TORTS § 323 (1977).

79. As explained in the following section, the potential for liability for defamation suggests one reason that Employer A might be reluctant to be more openly critical of Worker B in an employment reference.

on Employer A's reference, Employer C hires Worker B. Worker B subsequently severely injures a co-worker, Worker D, in an altercation.

Under the circumstances set forth in this hypothetical, Employer A may be found to have "undertake[n] . . . gratuitously . . . to render services to another which he should [have] recognize[d] as necessary for the protection of the other's person or things." Employer A thus may be "subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking" as described in Restatement (Second) § 323.<sup>80</sup> Here, Employer A's liability might extend to both Employer C and the injured coworker, Worker D.<sup>81</sup>

Another theory under which Employer A might be liable in the circumstances described above is negligent misrepresentation, described in Restatement (Second) of Torts § 311:

§ 311. NEGLIGENCE INVOLVING MISREPRESENTATION INVOLVING RISK OF PHYSICAL HARM

(1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results

(a) to the other, or

(b) to such third persons as the actor should expect to be put in peril by the action taken.

(2) Such negligence may consist of failure to exercise reasonable care

(a) in ascertaining the accuracy of the information, or

(b) in the manner in which it is communicated.<sup>82</sup>

Applying section 311 to the hypothetical situation described above, Employer A may be found to have given "false information" to Employer C, who took action "in reasonable reliance" on that information. Harm resulted to Worker D, a third person who Employer A should have expected "to be put in peril by the action taken," the hiring of Worker B by Employer C. Thus, according to section 311, Employer A may be liable for the physical harm to Worker D, caused at least in part by Employer A's misrepresentation by omission of material negative information in the employment reference concerning Worker B.

In short, the prevailing interpretation of the interrelated tort doctrines of nondisclosure, affirmative duty, and misrepresentation encourages employers to reason as follows: "I don't have to provide employment references for current or former employees; if I do, I'd better be careful to ensure that the

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80. Cf. *Gutzan v. Altair Airlines, Inc.*, 766 F.2d 135 (3d Cir. 1985) (explaining that trial court erred by finding as a matter of law that employment agency could not be liable to a rape victim under a negligence theory when the agency had recommended the rapist to a prospective employer and in doing so failed to investigate and warn the prospective employer that the rapist had misrepresented the circumstances leading to his prior conviction for rape); see also Swerdlow, *supra* note 28, at 1656-57 (discussing potential liability of employer for negligence in providing employment reference).

81. See RESTATEMENT (SECOND) OF TORTS § 324A (1977) (liability for negligent performance of gratuitous undertaking may extend to third parties foreseeably endangered).

82. *Id.* § 311 (1977).



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reference is accurate, complete, and includes sufficient warning of possible negative aspects of the applicant, or I could be liable for misrepresentation.” The incentives engendered are apparent: These principles of tort law strongly discourage employers from adopting open reference policies.

### 3. *Defamation and Reference Practices*

The most important aspect of the legal framework governing employment references is the law of defamation. The application of defamation doctrine in the employment reference context has been extensively discussed in existing literature;<sup>83</sup> again, however, a brief explanation of these principles and their application here is critical to the analysis which follows.

a. *Elements of a defamation claim.* Restatement (Second) of Torts § 558 sets forth the following elements for a defamation cause of action:

#### § 558. ELEMENTS STATED

To create liability for defamation there must be:

- (a) a false and defamatory statement concerning another;
- (b) an unprivileged publication to a third party;
- (c) fault amounting at least to negligence on the part of the publisher; and
- (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.<sup>84</sup>

The first element of a defamation claim, as stated in Restatement (Second) § 558, is a “false and defamatory statement concerning another.” The requirement that the statement be “false” requires little explanation.<sup>85</sup> The meaning of the requirement that the statement be “defamatory” is clarified elsewhere in the Restatement: “A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”<sup>86</sup> An employment reference containing false and derogatory information concerning a job applicant certainly would appear to meet this test, and courts addressing defamation claims based on a false, disparaging employment

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83. See, e.g., sources listed *supra* note 28.

84. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

85. In this regard, the Restatement accurately states the general common law rule: “One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true.” *Id.* § 581A. The cases that have been decided to date have not finally resolved the question of whether the plaintiff bears the burden of establishing the falsity of a defamatory statement or the defendant bears the burden of establishing its truth as an affirmative defense, at least in cases involving private figures and matters of purely private concern. See RODNEY A. SMOLLA, LAW OF DEFAMATION §§ 5.05 - 5.07 (reviewing decisions relating to burden of proof on issue of truth or falsity and suggesting that courts in cases involving private figures and matters of private concern should place burden on plaintiff to establish falsity of statements). A more detailed examination of this issue is beyond the scope of this paper.

86. RESTATEMENT (SECOND) OF TORTS § 559 (1977).

reference have not hesitated in finding this first element satisfied.<sup>87</sup>

The second element of a defamation claim is an "unprivileged publication to a third party."<sup>88</sup> The publication element is generally not at issue in a defamation claim based on an employment reference, for there is usually no dispute that the former employer published the allegedly defamatory statements to a "third party," here the prospective employer who requested the reference.<sup>89</sup> The requirement that the publication be "unprivileged" is usually examined from a different perspective in the employment reference context, as almost all employment references initially qualify as privileged communications. Accordingly, the publisher's liability will depend on whether or not the privilege was forfeited because abused.<sup>90</sup>

The third element of a defamation claim is "fault amounting at least to negligence on the part of the publisher." This requirement stems in large measure from the United States Supreme Court's decision, in 1974, that the First Amendment of the Constitution generally precludes the imposition of defamation liability on publishers who were "without fault" in publishing the defamatory matter.<sup>91</sup> In the employment reference context, analysis of this

87. See, e.g., *Pittman v. Larson Distr. Co.*, 724 P.2d 1379, 1387 (Colo. Ct. App. 1986), *infra* note 104.

88. "Publication" in this context refers to either the oral or written communication of information.

89. The requirement that the defamatory statement be "published" has occasionally been deemed satisfied even when the defamation was "published" to a third party by the individual claiming to have been defamed, under the doctrine of "compelled self-publication." This doctrine deems the publication element satisfied in circumstances where the original defamer knows or should know that the defamed individual will likely be required to repeat the defamatory statement to third parties. For example, consider an employer who discharges an employee and gives the employee a false and defamatory reason for the discharge. This employer may be expected to know that the discharged employee will likely be required to communicate to prospective new employers the former employer's defamatory statement of the reasons the employee was discharged from the previous employment. Under these circumstances, the employee's "republishing" of the statement may satisfy the publication element for the employee's defamation claim against the former employer, under the compelled self-publication doctrine. See *Lewis v. Equitable Life Assurance Soc'y*, 361 N.W.2d 875 (Minn. Ct. App. 1985), *rev'd in part, aff'd in part*, 389 N.W.2d 876 (Minn. 1986) (affirming decision but disapproving punitive damages award). See also Deanna J. Mouser, *Self-Publication Defamation and the Employment Relationship*, 13 INDUS. REL. L.J. 241, 255 (1991/1992). In a jurisdiction that has embraced the "compelled self-publication" doctrine, an employer's "no comment" reference policy may not fully protect the employee from liability for defamation on account of the employer's statements made in connection with the termination of an employee.

90. The privilege issues are sufficiently complex and important that I have chosen to discuss them more fully in the next section.

91. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974). As this article is written, there remains some question as to whether or not *Gertz's* fault requirement applies in situations involving only private individuals (as opposed to public figures) and matters of purely private interest. See RESTATEMENT (SECOND) OF TORTS § 580B, cmts. d-f (1977); see also PROSSER, *supra* note 68, § 115, at 825 ("[t]he Constitutional privilege has not been held to extend to many situations where a qualified privilege would be recognized. . . especially . . . with respect to private publication of defamatory statements about private individuals to further and vindicate private interests"). This particular issue has little significance for the broader issues addressed in this paper, for the privilege attending employment reference communications virtually always insulates publishers who are without fault from defamation liability, whether the disputes involve public or private figures and without regard to whether the matters addressed in the reference are deemed to be of general public interest. See also discussion *infra* at notes

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element will usually be subsumed under or trumped by analysis of the privilege issue, as the publisher of a defamatory reference will not likely be found to have abused and lost the qualified privilege unless the publisher has engaged in conduct that is sufficiently improper to meet the fault requirement imposed by *Gertz*.<sup>92</sup>

The fourth and final element of a defamation claim as stated in Restatement (Second) § 558 is “either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.” Again, this element is readily satisfied in the employment reference context, for two reasons. First, the defamation claimant usually can establish “special” (i.e., actual) harm or damage if the claimant lost a likely employment prospect because of a false and defamatory reference. Second, even if the defamation claimant cannot show special harm through the loss of a job opportunity, a defamatory employment reference will likely fall within one of the few categories of defamatory statements that are deemed actionable “*per se*” (i.e., actionable without the need for proof of actual or special harm).<sup>93</sup>

In short, most of the elements of a defamation claim as stated in Restatement (Second) § 558 appear to be present in the context of a false, disparaging employment reference. As explained in the following section, the element that has been most problematic is the privilege aspect, including the circumstances under which a privileged statement will be actionable in defamation because the privilege was abused.

b. *The qualified privilege.* Under certain circumstances, a publisher of a false and defamatory statement may avoid liability under a defamation theory if the statement is protected by an absolute or a conditional (also called a “qualified”) privilege. Virtually all employment references are at least initially protected by a conditional privilege, but the privilege may be forfeited if abused. One of the most critical aspects of the current legal framework is the inconsistency in how different jurisdictions have treated these issues and

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94-105 and accompanying text.

92. See discussion *infra* notes 99-104 and accompanying text.

93. See PROSSER, SUPRA note 68, § 112, at 788 (defamations “affecting the plaintiff in his business, trade, profession, office or calling” require no proof of damage); see also RESTATEMENT (SECOND) OF TORTS § 573 (1977) (“[O]ne who publishes a slander that ascribes to another conduct, characteristics or a condition that would adversely affect his fitness for the proper conduct of his lawful business, trade or profession, or of his public or private office, whether honorary or for profit, is subject to liability without proof of special harm”). Because most employees are not public figures, and most employment references will involve matters of private concern, employee-plaintiffs will not likely be required to establish that their employers knew and recklessly disregarded the falsity of their employment references as a prerequisite for recovering “presumed” damages (i.e. damages available without a showing of actual injury). See Mouser, *supra* note 89, at 249-51 (analyzing Supreme Court decisions relating to requirements for plaintiffs’ recovery of “presumed” damages in defamation actions).

articulated the tests for abuse and loss of the qualified privilege.<sup>94</sup>

Restatement (Second) of Torts § 593 states the general effect of a conditional privilege: "One who publishes defamatory matter concerning another is not liable for the publication if (a) the matter is published upon an occasion that makes it conditionally privileged and (b) the privilege is not abused."<sup>95</sup>

In other sections, the Restatement describes several different circumstances that may give rise to a conditional privilege. In the employment reference context, the two types of circumstances that are most apposite are (1) statements made for the protection of the interest of the recipient or a third person and (2) statements made to protect a "common interest."

The first context, protection of the interests of others, is explained in Restatement (Second) § 595:

§ 595. PROTECTION OF INTEREST OF RECIPIENT OR A THIRD PERSON

(1) An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that

(a) there is information that affects a sufficiently important interest of the recipient or a third person, and

(b) the recipient is one to whom the publisher is under a legal duty to publish the defamatory matter or is a person to whom its publication is otherwise within the generally accepted standards of decent conduct.

(2) In determining whether a publication is within generally accepted standards of decent conduct it is an important factor that

(a) the publication is made in response to a request rather than volunteered by the publisher or

(b) a family or other relationship exists between the parties.<sup>96</sup>

The second context, protection of a "common interest," is explained in Restatement (Second) § 596: "An occasion makes a publication conditionally privileged if the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know."<sup>97</sup>

The "common interest" privilege and the privilege arising from the desire to protect the interests of the recipient generally will apply to employment

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94. A number of commentators have extensively discussed the privilege issue in this context, highlighting the importance of the issue. See D. Jan Duffy, *Defamation and Employer Privilege*, 9 EMPLOYEE REL. L.J. 444 (1984); Reed & Henkel, *supra* note 28; Pamela G. Posey, Comment, *Employer Defamation: The Role of Qualified Privilege*, 30 WM. & MARY L. REV. 469 (1989); Tiefer, *supra* note 25. See also Daniloff, *supra* note 28; Donald Duffala, Annotation, *Defamation: Loss of Employer's Qualified Privilege to Publish Employee's Work Record or Qualification*, 24 A.L.R. 4th 144 (1983).

95. RESTATEMENT (SECOND) OF TORTS § 593 (1977) (discussing elements of conditional privilege arising from occasion).

96. *Id.* § 595.

97. *Id.* § 596.

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reference communications.<sup>98</sup> In other words, the publisher's and the recipient's "common interest" in the exchange of reference information, or the recipient's interest in receiving that information, have generally been deemed sufficiently important that a qualified privilege will protect the publisher of an employment reference from liability for defamation. The issue on which the courts have differed is the nature of conduct on the part of the publisher of an employment reference that will result in loss of the privilege.

The Restatement lists a number of different types of conduct that may constitute abuse of the conditional privilege and result in loss of its protection. The list includes the following: (1) the publisher's knowledge or reckless disregard as to the falsity of the defamatory matter;<sup>99</sup> (2) the publication of the defamatory matter for some improper purpose;<sup>100</sup> (3) "excessive" publication (e.g., publication to persons other than those to whom the communication is important and thus privileged);<sup>101</sup> and (4) the publication of defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged.<sup>102</sup>

The various types of abuse described by the Restatements have sometimes been lumped together under the general heading "malice." As Prosser and Keeton's hornbook notes,

[T]he qualified privilege will be lost if the defendant publishes the defamation in the wrong state of mind. The word "malice," which has plagued the law of defamation from the beginning, has been much used in this connection, and it frequently is said that the privilege is forfeited if the publication is "malicious."<sup>103</sup>

The discussions in Prosser and the Restatement of the standards for abuse and loss of the qualified privilege to defame suggest that a considerable range of conduct on the part of the publisher of a defamatory statement may result in loss of the privilege. In fact, that is exactly the state of the common law, and different jurisdictions have articulated different, often-conflicting standards for the circumstances under which the qualified privilege will be deemed to have been abused and forfeited.<sup>104</sup>

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98. See, e.g., *Sigal Const. v. Stanbury*, 586 A.2d, 1204, *supra* note 73, at 1213-17; see generally sources listed *supra* at note 94.

99. RESTATEMENT (SECOND) OF TORTS §§ 600-602 (1977).

100. *Id.* § 603.

101. *Id.* § 604.

102. *Id.* §§ 605, 605A.

103. PROSSER, *supra* note 68, § 115, at 833.

104. Even a partial survey of the state cases reveals a startling variety of tests. See, e.g., *Clark v. America's First Credit Union*, 585 So.2d 1367, 1371 (Ala. 1991) (actual malice can overcome privilege and may be shown by evidence of "previous ill will, hostility, threats, etc."); *Scholtes v. Signal Delivery Serv., Inc.*, 548 F. Supp. 487, 497 (W.D. Ark. 1982) ("malice" to overcome privilege is not limited to hate, vindictiveness, or animosity but may be found in reckless disregard of another's rights or conscious indifference to results); *Manguso v. Oceanside Unified School Dist.*, 200 Cal. Rptr. 535, 539 (Cal. Ct. App. 1984) (in non-media cases, malice to overcome privilege may be shown where defendant acted with ill will or hatred toward plaintiff, lacked reasonable grounds for believing truth of statement, or made statements for reasons other than to protect the interest for which protection was given); *Pittman v. Larson Distributing Co.*, 724 P.2d 1379, 138 Colorado 1986) (protection of

For purposes of this Article, the most significant aspect of the inconsistencies in the privilege standards is their effect on employers' deliberations when determining reference strategies. Specifically, the standards for abuse and loss of the qualified privilege vary so considerably from jurisdiction to jurisdiction that employers and their counsel are uncertain as to which legal standards will govern their potential exposure to defamation liability on account of an adverse reference. The result, again consistent with other aspects of the current legal framework, is to encourage employers to adopt a conservative, "no comment" reference policy to minimize the risk of liability.<sup>105</sup>

### C. Other Critical Aspects of the Legal Framework

Two final aspects of the current legal framework warrant attention in this preliminary explication of that framework's impact on employment reference practices. The first is the recent emergence of the tort of "negligent hiring." The second is the prevailing rule governing payment of attorneys' fees incurred in litigation over employment references.

#### 1. The Emergence of "Negligent Hiring" Claims

The recent emergence of the tort of "negligent hiring" has important implications for the analysis in this Article.<sup>106</sup> Under this tort theory, an employer who hires an employee without reasonably investigating the

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conditional privilege lost if publisher acts with "express malice"); *Battista v. Chrysler Corp.*, 454 A.2d 286, 291 (Del. Super. Ct. 1982) (among other tests, statement must be made in good faith without malice; something less than spite, ill will, or desire to do harm may constitute actual malice, but mere indignation and resentment toward plaintiff will not suffice); *Sigal Const. v. Stanbury*, 586 A.2d, 1204, *supra* note 73, at 1214 (to defeat privilege, plaintiff must prove that defendant acted with "common law malice," which may be shown by defendant's gross indifference or recklessness amounting to wanton and willful disregard of plaintiff's rights) (applying Virginia law); *Knepper v. Genstar Corp.*, 537 So.2d 619, 622 (Fla. App. 1988) (plaintiff must show express malice or malice in fact to overcome qualified privilege; malice is present where the primary motive for statement was an intention to injure the plaintiff); *Anderberg v. Georgia Electric Membership Corp.*, 332 S.E.2d 326, 328 (Ga. App. 1985) (quoting *Land v. Delta Airlines*, 147 Ga. App. 738, 739 (1979)) ("[m]alice to avoid qualified privilege must be actual and with evil intent"); *Krasinski v. United Parcel Service*, 530 N.E.2d 468, 471 (Ill. 1988) (plaintiff must plead and prove actual malice to overcome privilege; actual malice shown where defendant made statement with knowledge of falsity or reckless disregard of whether statement was true or false); *Booth v. Electronic Data Systems Corp.*, 799 F.Supp. 1086, 1091 (D. Kan. 1992) (malice necessary to overcome privilege is "actual malice" defined as "actual evil-mindedness or specific intent to injure"). *See also* Duffala, *supra* note 94.

105. Employers may not be predictably risk-averse, but the lawyers counseling employers usually are. In the face of the different and inconsistent standards that may determine employer liability in this context, employment lawyers generally will favor, and will urge employers to adopt, a conservative strategy. The most conservative strategy in this context. Other commentators have recognized that the varied standards for abuse of the qualified privilege detract from employers' ability to predict the consequences of their reference practices. *See, e.g.*, Daniloff, *supra* note 28, at 711; Horkan, *supra* note 28, at 519; Posey, *supra* note 94, at 493-94.

106. The term "negligent hiring" has sometimes been used in a way that encompasses sub-categories including "negligent retention" and "negligent supervision." *See, e.g.*, RONALD M. GREEN & RICHARD J. REIBSTEIN, *EMPLOYER'S GUIDE TO WORKPLACE TORTS* 5 (1992).

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employee's background may later be held liable for torts the employee commits at the workplace. As discussed in Part I, the possibility of employer liability for "negligent hiring" increases the importance of measures to ensure the availability of employment reference information.

Our tort law has long recognized that employers may be held legally responsible for torts committed by their employees, under the doctrine of *respondeat superior*.<sup>107</sup> Under this doctrine, employers will generally not be liable for torts committed by their employees unless the employees were acting within the scope of their employment at the time they committed the torts. If the employees did act within the scope of employment, the employers are generally liable without regard to whether or not they exercised reasonable care in hiring and supervising the employees who committed the torts.

Under the comparatively recent tort of "negligent hiring," the employer's liability for certain torts committed by an employee does not depend upon whether or not the employee acted within the scope of employment when committing the tort. Instead, the focus is on the employer's conduct at the time the tortfeasor employee was interviewed and hired; an employer who failed to use reasonable care in investigating an applicant's background may be liable for torts the applicant commits in the course of employment after being hired, whether or not those torts are deemed to have been committed within the scope of employment.<sup>108</sup>

The potential for liability under a negligent hiring theory becomes especially important when an employee commits an intentional tort, as an employer often can avoid liability under a *respondeat superior* theory by showing that the employee acted outside the scope of employment when committing the intentional tort. A case decided in 1980 in Florida, for example, involved a plaintiff's claim for damages against a condominium management entity after she was allegedly assaulted by one of its employees.<sup>109</sup> The District Court of Appeal of Florida first noted that "[m]ost jurisdictions . . . recognize that independent of the doctrine of respondeat superior, an employer is liable for the willful tort of his employee committed against a third person if he knew or should have known that the employee was a threat to others."<sup>110</sup> The court then reversed the lower court's summary judgment for the defendant management company; the appellate court held that there were material issues of fact as to whether the defendant had exercised

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107. See PROSSER, *supra* note 68, § 69 at 499.

108. The determination of what kind and scope of investigation is "reasonable" will generally hinge upon the particular job the applicant is being considered for, and the degree of risk to other employees or the public that may result from the performance of the position's duties. See GREEN AND REIBSTEIN, *supra* note 106, at 5.

109. *Williams v. Feather Sound, Inc.*, 386 So. 2d 1238 (Fla. Dist. Ct. App. 1980), *petition for rev. denied*, 392 So. 2d 1374 (Fla. 1981).

110. *Id.* at 1239-1240.

reasonable care in investigating the assaulting employee's background before placing him in a position where he would have ready access to the condominium owners' living quarters.<sup>111</sup>

The tort of negligent hiring has now been recognized in almost every state.<sup>112</sup> Where the tort has been recognized, employers may be liable to employees or members of the public who are injured by an employee whom the employer hired without a reasonable investigation. The importance of the tort of negligent hiring for the analysis in this Article is readily apparent: To reduce potential exposure for negligent hiring, commentators have advised employers to investigate applicants' references carefully.<sup>113</sup> If many (perhaps a majority of) employers adopt "no comment" reference policies, prospective employers of job applicants will often be frustrated in their efforts to conduct responsible background checks, and the social safety policies on which the "negligent hiring" doctrine is grounded will likewise be undermined.

## 2. Attorneys' Fees

The last aspect of the legal framework governing employment references discussed here, the prevailing rules regarding attorneys' fees, is extremely important because of its influence on employer decisionmaking. Specifically, under the so-called "American rule," both the winner and the loser in litigation are generally required to pay their own attorneys' fees.<sup>114</sup> Because of this prevailing rule, an employer (or, in some circumstances, the employer's insurer) will likely pay significant fees to attorneys if forced to defend the employer's reference practices, even if the employer prevails against the challenge. The result again is to foster conservative reference practices, and to discourage open reference strategies.

### III. CHANGING THE INCENTIVES: ENCOURAGING EMPLOYERS TO PROVIDE REFERENCES

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111. *Id.* at 1240-41. The employee who allegedly committed the assault had a prior criminal record and had undergone psychiatric treatment. The court concluded that a jury should determine if defendant had exercised reasonable care when it hired the assaultive employee without even contacting the references the employee listed or the employee's previous employers. *Id.*

112. See GREEN AND REIBSTEIN, *supra* note 106, at 5.

113. See GREEN AND REIBSTEIN, *supra* note 106, at 245-50; Cathie A. Shattuck, *The Tort of Negligent Hiring and the Use of Selection Devices: The Employee's Right of Privacy and the Employer's Need to Know*, 11 INDUS. REL. L.J. 2,3 (1989); Swerdlow, *supra* note 28, at 1649-53 (discussing tort of negligent hiring and recognizing tension between negligent hiring doctrine and employer reluctance to provide reference information because of fear of defamation liability); Celeste L. Frank, *Employee Background Checks: Negligent Hiring*, TEXAS B.J. 118 (Feb. 1992).

114. There are exceptions to the prevailing rule, but they will not usually apply when a former employee sues a former employer on account of a negative employment reference. See discussion *infra* notes 170-171 and accompanying text. Other commentators have recognized that the fear of litigation expenses may have a significant chilling effect on employers' reference practices. See, e.g., Horkan, *supra* note 94, at 534.



## Laws Governing Employment References

The previous section explored how a number of aspects of the current legal framework combine to produce powerful incentives for employers to adopt “no comment” reference policies. Many different types of reforms could conceivably encourage a freer flow of reference information. In light of the preceding analysis of employers’ incentives under the current legal regime, three particular reforms seem most likely to encourage significant changes in employer reference strategies:<sup>115</sup> (2) imposing on employers a limited “affirmative duty” to respond to reference inquiries, the breach of which may result in tort liability; and (3) modifying in this context the “American rule” on litigation expenses, so that litigants may in certain circumstances recover their attorneys’ fees incurred in litigation over reference practices.

### A. *Clarification of the Standards for Abuse: Loss of the Qualified Privilege*

As discussed in Part II, the current legal standards governing employer liability for employment references vary considerably from state to state; this is particularly true of the most critical standards in this context, those governing the abuse and loss of the qualified privilege. One result of the multiplicity of standards that may potentially determine an employer’s liability for employment references is that employers and their counsel are encouraged to favor conservative, “no comment” reference strategies.<sup>116</sup> Conversely, employers and their counsel should be encouraged to favor more open reference approaches if the standards for abuse and loss of the qualified privilege in this context are clarified and made more focused, consistent and predictable.

After examining each of the principal standards currently used to determine employer liability in this context, this section concludes that states should clarify and, where necessary, change the current standards by discontinuing the use of a “malice” (or “improper purposes”) test for forfeiture of the qualified privilege protecting employment reference communications.<sup>117</sup> In place of that “malice” (or “improper purposes”) test, the states should specify that a former employer giving an employment reference will forfeit the qualified privilege *only* if the employer communicated false and defamatory reference information and in doing so: (1) knew that the defamatory matter was false<sup>118</sup>

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115. In some jurisdictions, this “clarification” will involve modifying the standards currently used.

116. See discussion *supra* note 104 and accompanying text.

117. Other commentators have recommended that the common law “malice” standard for forfeiture of the qualified privilege, focusing on the employer’s subjective motivations, should be discontinued or modified, for reasons similar to those discussed below. See, e.g., Lewis *et al.*, *supra* note 28, at 861-62; Reed & Henkel, *supra* note 28, at 315-23; Daniloff, *supra* note 28, at 711; Posey, *supra* note 94, at 494-95.

118. This section proposes that the employer’s forfeiture of the qualified privilege be conditioned, as a threshold matter, on the falsity of the damaging statements the employer publishes when giving an employment reference. The reason for this condition is readily apparent in the context of a defamation

or acted with reckless disregard as to its truth or falsity; (2) published the defamatory matter to persons not reasonably believed to be persons to whom the communication was important and thus privileged; or (3) included defamatory matter not reasonably believed to be necessary to accomplish the purposes for which the communication is privileged.<sup>119</sup>

1. *Proposed Criteria for Evaluating the Efficacy of the Standards:  
A Premise as to Our Goals for the Standards*

The following sections will examine and critique the principal standards currently used to determine when the qualified privilege will be forfeited because of abuse.<sup>120</sup> Four questions are asked to test the efficacy of each

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claim, which in the first instance depends upon the defendant's publication to a third party of false information that was damaging to the plaintiff's reputation.

It is less obvious that this condition (i.e., the falsity of the statement) should be required for forfeiture of the qualified privilege in the context of the tort of intentional interference with prospective economic advantage. See *supra* notes 67-73 and accompanying text (discussing elements and application of this tort in the employment reference context). To illustrate the potential problem, suppose a former employer maliciously gives an inquiring prospective new employer unfavorable—but *true*—information about a former employee, even though the unfavorable information is *not* relevant to the former employee's suitability for employment. Under the standards proposed in this section, the employer would be protected by the qualified privilege from liability for tortious interference, because the damaging statements were not false. Yet the result for the employee is that his or her future job prospects may be damaged by this disclosure of truthful, but irrelevant, information. This result, while troublesome, seems compelled under RESTATEMENT (SECOND) OF TORTS § 772, which provides in pertinent part that "[o]ne who intentionally causes a third person not to . . . enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation [i.e. does not abuse the qualified privilege] by giving the third person . . . truthful information" (emphasis added). See *supra* note 71.

It is beyond the scope of this paper to explore whether the tort of intentional interference should perhaps be expanded to encompass a publisher's publication to third parties of damaging *truthful* information that is irrelevant to the legitimate subject matter that gives rise to the qualified privilege. (This author believes that such a reformulation might be desirable, although the implications for the constitutional protection of free speech would have to be carefully considered.) Policymakers should be aware, however, that acceptance of this aspect of the standards proposed by this section—following as it does Restatement (Second) § 772—would codify a qualified privilege protecting former employers from liability for tortious interference if they publish to a prospective new employer true and damaging information about a former employee, even if that damaging information were irrelevant to the employee's suitability for employment.

119. As noted in the model legislation in Section IV, I would require plaintiffs to prove with "clear and convincing evidence" that a defendant abused and forfeited the qualified privilege. In their March 1993 draft of the ill-fated Uniform Defamation Act, the Conference of Commissioners on Uniform State Laws adopted a "clear and convincing" standard of proof on issues relating to forfeiture of the qualified privilege in defamation cases; the Commissioners extrapolated from the Supreme Court's conclusion that issues of constitutional fact—like "actual malice" in defamation cases involving public officials—must be proved by clear and convincing evidence. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 511 (1984). See also Robert M. Ackerman, *Bringing Coherence to Defamation Law Through Uniform Legislation: The Search for an Elegant Solution*, 72 N.C. L. REV. 291, 304 n.65 and accompanying text (1994). Although the Commissioners ultimately withdrew the draft Uniform Defamation Act, its "clear and convincing evidence" standard is consistent with—if not required by—the Supreme Court's defamation decisions. I suggest its adoption here for the same reasons that inspired the committee that prepared the draft Uniform Defamation Act. See *id.*

120. The various standards currently applied to determine employer liability in this context were described in Part II. See *supra* notes 94-105 and accompanying text.

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standard. First, does a standard impose fair and reasonable requirements on employers? Second, does the standard adequately safeguard employees' legitimate interests in protecting their reputations and privacy? Third, are the standard and its applications sufficiently clear to avoid creating excessive incentives for employers and employees to litigate disputes over employment references? Fourth, is there an alternative standard that might better serve or balance the interests that the standard under consideration is intended to serve or balance?

These four criteria for examining the standards are based upon the premise that our real concern in establishing the standards for forfeiture of the privilege is *not*—or at least *should not be*—the desire to police the subjective motives employers may have in providing reference information.<sup>121</sup> Instead, our concern in choosing the standards is or should be to encourage employers to conduct themselves responsibly in giving employment references, i.e., in ways that will further the interests giving rise to the privilege. Specifically, the standards should be designed to encourage employers—*whatever their subjective motives may be*—to do the following: (1) ensure the accuracy of the reference information they provide; (2) provide reference information (particularly damaging reference information) only to persons the employer reasonably believes will use the information for the purposes giving rise to the privilege; and (3) disseminate only reference information that is pertinent to an applicant's suitability for employment.

With this premise, and with these goals for our standards in mind, we can better proceed to apply our four criteria to each of the standards that have traditionally been used to determine when the qualified privilege will be lost because of abuse. Through this analysis, we will be able to decide which of the traditional standards should be retained and which should be discarded.

### 2. *Discontinuing the Use of the "Malice" and "Improper Purpose" Standards*

As explained in Part II, various types of abuses that may result in forfeiture of the qualified privilege have often been lumped together under the general heading "malice." The reader may recall Prosser's description of the historical treatment of "malice" in this context: "The word 'malice,' which has plagued the law of defamation from the beginning, has been much used in this connection, and it is frequently said that the privilege is forfeited if the publication is 'malicious.'"<sup>122</sup> The Restatement of Torts essentially echoes

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121. This premise might be rephrased as a question: "Why should we care if an employer harbors some ill will toward a former employee and thus takes some satisfaction in giving a negative reference for that employee, if other standards have required the employer to act responsibly in communicating the reference information?"

122. PROSSER, *supra* note 68, § 115, at 833.

this general "malice" test in slightly different words; the Restatement provides that the qualified privilege is forfeited when the publisher of defamatory matter "does not act for the purpose of protecting the interest [that gives rise to the privilege]." <sup>123</sup> Application of our four criteria for evaluating the standards strongly suggests that use of these "malice" or "improper purposes" tests should be discontinued.

Applying the first criterion, it does not seem fair or reasonable to require that employers must act without "malice" and for "proper purposes" if they are to receive the benefit of the qualified privilege. An employer who feels that a former employee deserves a negative employment reference often will have some feelings of animosity toward that former employee. In these circumstances, an employer may well have several motives when giving a damaging employment reference concerning the former employee; the employer will likely be motivated both by the desire to protect the interests of the prospective new employer (a "proper" purpose or motive) *and* by some feelings of resentment and ill-will toward the former employee (an arguably "improper" purpose or motive). <sup>124</sup> In these circumstances, the employer may find it difficult or impossible to quantify the relative subjective importance of the "proper" and "improper" purposes motivating the employer's damaging reference statements, and it does not seem fair or realistic to require employers to establish that "proper" motives were predominant. Our first criterion thus seems to suggest that we should discontinue use of the "malice" and "improper purpose" tests for forfeiture of the qualified privilege, at least if other existing standards will encourage employers to act responsibly in disseminating reference information.

In contrast, the second criterion seems to favor retention of these tests, as the "malice" and "improper purpose" tests may help safeguard employees' interests in receiving fair treatment and protecting their reputations and privacy. The rule that employers who act with "malice" will forfeit the

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123. RESTATEMENT (SECOND) OF TORTS § 603 (1977) ("One who upon an occasion giving rise to a conditional privilege publishes defamatory matter concerning another abuses the privilege if he does not act for the purpose of protecting the interest for the protection of which the privilege is give"). *See also id.* at cmt. a: ("Thus a publication of defamatory matter upon an occasion giving rise to a privilege, if made solely from spite or ill will, is an abuse and not a use of the privilege").

124. The issue presented in these circumstances is somewhat analogous to, but is not coextensive with, the "mixed motive" issue sometimes presented by cases involving illegal employment discrimination (e.g., when an employer has acted against an employee with permissible motives but also with an impermissible motive to discriminate on the basis of the employee's race). Congress addressed the latter type of "mixed motive" question in Section 107 of the Civil Rights Act of 1991, which, in pertinent part, amends Section 703 of Title VII of the Civil Rights Act of 1964. The new "mixed motive" provisions are now codified at 42 U.S.C. § 2000e-2(m). The "mixed motive" provisions of the Civil Rights Act of 1991 would not apply to employment references unless the circumstances involved also triggered application of the civil rights laws prohibiting employment discrimination because the employer's motivation in giving a negative reference was based on race, color, sex, religion, or national origin.

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privilege should discourage an employer from using damaging employment references vindictively to damage the prospects of former employees whom the employer dislikes or resents. Conversely, employers might be encouraged to use damaging employment references for malicious purposes if we discontinue the rule that employers who act with "malice" will forfeit the privilege. If we believe that our legal standards should protect employees against malicious actions by their employers, our second criterion (i.e. safeguarding the interests of employees) suggests that the "malice" and "improper purpose" tests for forfeiture of the privilege should perhaps be retained.

The third criterion, however, weighs strongly against retention of the "malice" and "improper purpose" tests for forfeiture of the privilege, as these tests create excessive incentives for employees and employers to litigate disputes over references. As noted above, the "malice" and "improper purpose" tests are very difficult to apply in circumstances where the publisher of defamatory statements acts with both proper and arguably improper malicious motives (i.e., partially out of desire to serve the interests giving rise to the privilege and partially out of a desire, which might be characterized as "malicious," to injure the person to whom the defamatory statement relates). Prosser offers the following explanation of how the courts have treated these situations:

[W]hile there is authority to the contrary, it is the better and perhaps more generally accepted view that the mere existence of ill will does not necessarily defeat the privilege. If the privilege is otherwise established by the occasion and a proper purpose, the addition of the fact that the defendant feels indignation and resentment toward the plaintiff and enjoys defaming him will not always forfeit it. Perhaps the statement which best fits the decided cases is that the court will look to the primary motive or purpose by which the defendant apparently is inspired. Discarding "malice" as a meaningless and quite unsatisfactory term, it appears that the privilege is lost if the publication is not made primarily for the purpose of furthering the interest which is entitled to protection. If the defendant acts chiefly from motives of ill will, he or she will certainly be liable; and the vehemence of his or her language may be evidence against the defendant in this respect.<sup>125</sup>

Unfortunately, this treatment by the courts of these situations produces strong incentives for employers and employees to litigate disputes over references. An employer who communicated negative reference information to an applicant's prospective employer should almost always be able to claim to have acted at least in part for "proper purposes," at least so long as the information communicated had some bearing on the applicant's suitability for employment. On the other hand, when an employer's reference has been critical of a former employee, the employee usually can make a colorable claim

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125. PROSSER, *supra* note 68, §115, at 834. See also RESTATEMENT (SECOND) OF TORTS § 603 cmt. a (1977) ("[I]f the publication is made for the purpose of protecting the interest in question, the fact that the publication is inspired in part by resentment or indignation at the supposed misconduct of the person defamed does not constitute an abuse of the privilege.").

that the employer may or must have been motivated at least in part by "malice" or "ill will."<sup>126</sup> The result is to greatly encourage litigation over reference disputes, with the plaintiff and the defendant respectively striving to convince the factfinder that the defendant's motives were primarily "malicious" or primarily "proper." This tendency of the "malice" and "improper purpose" tests to encourage litigation over reference disputes is a compelling reason why these standards should be discarded, at least if other more clearly-defined standards adequately serve the interests served by the "malice" and "improper purpose" standards.

This leads us to the fourth criterion, the availability of better alternatives. In this regard, standards discussed in the following sections appear to serve our goals better than the general "malice" or "improper purpose" standards do, and do so without creating the same excessive incentives for litigation. The availability and comparative efficacy of these alternatives compels the conclusion that states should discontinue use of the "malice" and "improper purpose" tests for forfeiture of the qualified privilege in the employment reference context.

### 3. *Knowledge of Falsity or Reckless Disregard of the Possible Falsity of the Reference Given*

Under traditional common law principles, publishers of defamatory matter forfeited an otherwise applicable qualified privilege if they knew that the information they published was false or if they recklessly disregarded the possibility that the information they published was false.<sup>127</sup> Our four criteria for evaluating the standards for forfeiture of the qualified privilege suggest that, on balance, this standard should be retained.

Applying our first criterion, it certainly seems fair and reasonable to require employers to forfeit the privilege if they publish a defamatory reference and do so knowing the reference to be false or recklessly disregarding the possibility it is false. As discussed above, our standards should be designed to encourage employers to act responsibly in communicating reference information; employers will not be encouraged to act responsibly if our standards permit them to receive the benefit of the qualified privilege even when they recklessly or—even worse—*knowingly* disseminate incorrect and damaging

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126. The reader should recall that the context in which the privilege issue will become important is the communication by the employer of *false* and disparaging reference information. Many factfinders may be inclined to presume, at least initially, that such false, disparaging statements must have been motivated in some measure by personal ill will.

127. See RESTATEMENT (SECOND) OF TORTS § 600 (1977) (qualified privilege forfeited where publisher of defamatory matter knows matter to be false or acts in reckless disregard as to its truth or falsity). See also PROSSER, *supra* note 68, § 115, at 835 ("no reasons of policy can be found for conferring immunity upon the foolish and reckless defamer who blasts an innocent reputation without making any attempt to verify his statements").

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reference information. Our first criterion thus weighs in favor of retaining a standard that is *at least* this demanding of employers.<sup>128</sup>

Our second criterion also seems to require that this standard should at least be retained, if not strengthened, if employees' interests in their reputations are to be adequately protected. As noted above, the current standard should at least discourage employers from recklessly or knowingly communicating incorrect reference information. Any standard that is less demanding of employers in these respects would seem to offer insufficient protection to employees, whose reputations can be severely damaged when a former employer disseminates false reference information. Our second criterion thus favors retention of a standard that is *at least* this demanding of employers.

Our third criterion (i.e., the tendency of the standard to foster litigation) does not seem to weigh heavily either for or against retention of this standard in its current form, for any feasible reformulation of this standard would seem to involve incentives for litigation that are roughly comparable to those existing under the present standard. We might envision the alternative standards in this regard as occupying different positions along a continuum, with that continuum consisting of the different degrees of care we might require an employer to exercise before disseminating damaging reference information about a former employee. At one end of this continuum, the employer would be liable for publishing false information (i.e., would forfeit the privilege) even if the employer had exercised extraordinary care in investigating the statement before publishing it; we might call this a "strict liability" standard. At the other end of the continuum, the employer would receive the benefit of the privilege and be immunized from liability even if the employer gave false reference information and in doing so knew that the reference information was false.

Both ends of this continuum offer conceivable "bright-line" tests, but neither of these tests seems feasible; the "strict liability" standard is likely precluded by the Supreme Court's *Gertz* decision,<sup>129</sup> and the alternative "bright-line" test would reward *knowing* purveyors of falsehoods by permitting them to enjoy the benefit of the qualified privilege.

At any point between the two "bright-line" extremes, both plaintiff and defendant would have an incentive to convince the factfinder that the defendant had either violated or complied with the requisite standard of care. The room for advocacy in these situations—as contrasted with the "bright-line" tests—encourages parties to litigate their differences on this score, and the

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128. Retention of this standard should also substantially limit the opportunities for employers to use employment references for "malicious" purposes, as employers will forfeit the privilege if they knowingly publish misleading, damaging information about former employees in an effort to injure their employment prospects. For this reason, this standard serves much the same purpose as the "malice" and "improper purposes" standards serve, while also being more direct and easier to apply than those standards are.

129. See *supra* note 91 and accompanying text.

incentives to litigate do not seem to change materially at different locations along the continuum. Thus, our third criterion (i.e., the incentives for litigation) does not seem to weigh strongly either for or against retention of the standard in its current form.

The fourth criterion, the consideration of alternatives, gives us some pause when applied to this standard. As noted above, the two conceivable "bright-line" alternatives to the current standard seem untenable. The standard could be revised, however, to require that employers exercise reasonable care before publishing reference information if they wish to receive the benefit of the qualified privilege. This "reasonable care" alternative has some distinct advantages when compared to the existing "recklessness" standard, and it is not immediately apparent why we should reject a "reasonable care" reformulation of this standard.

The advantages of the "reasonable care" standard over a recklessness standard seem obvious. It seems fair to ask employers to exercise reasonable care before disseminating damaging reference information; indeed, it is well established as a general rule under our tort law that actors in most situations must exercise reasonable care or pay damages for injuries proximately caused by their failure to do so. Moreover, a standard that requires employers to exercise reasonable care before providing references should protect employees' reputations more effectively than does a standard that only requires employers not to be "reckless" in disseminating reference information.

The disadvantages of the "reasonable care" standard, however, are very significant. If our standard requires employers to forfeit the privilege when they are negligent in providing references, employers will almost certainly be even more deterred from providing reference information than they already are under the "recklessness" standard. To rephrase this concern, employers should feel more vulnerable in a legal framework that requires them to forfeit the privilege for mere negligence than they feel in a framework that requires them to forfeit the privilege only for "recklessness" or knowing wrongdoing. The result of a change to a negligence standard would thus likely be to discourage employers from undertaking the very behavior—i.e., the communication of reference information—that we are hoping to encourage by protecting the behavior with a qualified privilege.

On balance, it appears that a "reasonable care" reformulation of this standard *would* deter employers from providing reference information even more than the current standard does, and that this deterrent effect is a disadvantage significant enough to outweigh the advantages of that reformulation, although the question is a close one.<sup>130</sup> For this reason, I believe that

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130. Our traditional common law treatment of this issue appears premised on the same balancing of the advantages and disadvantages of a "reasonableness" standard for preservation of the privilege.



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we should retain the existing standard and continue to condition forfeiture of the qualified privilege on the employer's knowledge or reckless disregard of the falsity of the reference information the employer disseminated.

### 4. *Excessive Publication*

As explained in Part II, one type of abuse that has resulted in forfeiture of the qualified privilege is "excessive publication." Specifically, the publisher of a defamatory statement may lose the benefit of a qualified privilege by publishing defamatory matter to a person who does not have a legitimate interest in receiving the information, even if the communication could have been privileged if made to a proper recipient.<sup>131</sup> Our four criteria for evaluating the standards again suggest that this standard for application of the qualified privilege should be retained.

Applying the first criterion, it seems fair and reasonable to require employers to publish damaging reference information only to persons whom the employer reasonably believes should receive the information to further the interest giving rise to the qualified privilege in the first place-i.e., the prospective new employer's legitimate interest in receiving information that will permit an informed decision on employment of an applicant. Accordingly, a former employer should not receive the benefit of the privilege if the employer published defamatory information concerning a former employee to a person whom the employer did not believe to be in a position to use the information to assist the prospective new employer in making its hiring decision.

As a practical matter, this requirement should not impose unfair burdens on the former employer. I would argue that any employer who provides reference information in response to a *request* for that information meets this standard for application of the qualified privilege, as long as the employer reasonably believes the requester to be in a position to pass the reference information along to the individual(s) who will decide whether or not to hire the applicant.<sup>132</sup> Accordingly, to meet this standard for application of the

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See PROSSER, *supra* note 68, § 115, at 835 (concluding that "negligence is no longer regarded as sufficient to amount to an abuse of a qualified privilege"). See also RESTATEMENT (SECOND) OF TORTS § 600 cmt. b (1977) ("One consequence of the [*Gertz*] holding is that mere negligence as to falsity, being required for all actions of defamation, is no longer treated as sufficient to amount to abuse of a conditional privilege").

131. See Prosser, *supra* note 68, § 115, at 832 (qualified privilege does not extend to "publication to any person other than those whose hearing of it is reasonably believed to be necessary or useful for the furtherance of [the interest giving rise to the privilege]"). See also RESTATEMENT (SECOND) OF TORTS § 604 (1977) (describing circumstances constituting "excessive publication").

132. In this regard, the reader may recall that the Restatement (Second) of Torts § 595, describing circumstances that may give rise to a qualified privilege, lists as an "important factor" that a "publication is made in response to a request rather than volunteered." See *supra* note 96 and accompanying text.

privilege, an employer need only wait for a request for reference information and exercise reasonable judgment as to the requester's apparent ability to use the information for its intended purposes, the facilitation of the employment decision.<sup>133</sup>

Applying the second criterion, it appears that the "excessive publication" standard should help safeguard employees' interests in their reputations and privacy. In effect, the requirement that employers avoid "excessive publication" of defamatory reference information discourages employers from "gossiping" about former employees (i.e., disseminating damaging information about a former employee in circumstances where the employer does not reasonably believe that the recipient of the information will use it to assist a prospective employer in evaluating the former employee for potential hiring). If this standard does discourage this type of "gossiping," the second criterion suggests that it should be retained.

Our third criterion may weigh against continued use of the "excessive publication" standard, for the test does appear to increase the likelihood of litigation over reference communications. The test permits a plaintiff to overcome a defendant's qualified privilege by showing that the defendant published defamatory reference information to a person or persons whom the defendant did not reasonably believe would use the information to assist a prospective employer in evaluating the applicant. The "excessive publication" standard thus gives a plaintiff a greater opportunity and an incentive to litigate claims than if the standard were not available or were redefined as a "bright-line" test.

This last point leads us to the fourth criterion, the consideration of alternatives. The "excessive publication" standard for forfeiture of the privilege could be refashioned as a "bright-line" test. Specifically, we could adopt a standard that an employer "excessively publishes" defamatory reference information (and forfeits the privilege for that reason) if, and only if, the employer publishes that information *to a person who has not requested it*. The rationale underlying this "bright-line" test would be that a person requesting reference information should virtually always be a person seeking the information for the purposes giving rise to the privilege, and that a former employer who "volunteers" negative information without being requested to do so may likely be acting as an "officious intermeddler".

This "bright-line" reformulation would have at least two positive consequences: (1) Employers would be relieved of the burden of exercising

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133. As explained below, I believe that there are circumstances when the employer who *volunteers* reference information should receive the benefit of the qualified privilege, even if that information was not requested by the prospective new employer's representative. For this reason, I would not favor a standard that makes the employer's receipt of a request for information a *prerequisite* for the extension of the qualified privilege. See discussion *infra* pp. 90-91.

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judgment and discretion in evaluating whether a requester of reference information has a legitimate interest in receiving it, and thus might provide reference information more freely to those who request it; and (2) the incentives to litigate disputes over this aspect of reference communications should be reduced, as the “bright-line” nature of the test would increase plaintiffs’ and defendants’ ability to predict the results of litigation.<sup>134</sup>

I concede these possible advantages of a “bright-line” reformulation of the “excessive publication” standard. Nonetheless, I do not favor adopting that reformulation, for two major reasons. The first, already stated above, is that I do not feel it imposes an unfair burden on employers to require them to exercise judgment in deciding if a person who requests reference information reasonably appears to be requesting it for legitimate purposes. The second, more important than the first, is that I believe there may be circumstances when an employer who “volunteers” reference information should receive the benefit of the qualified privilege, even if the employer did not first receive a request for that reference. My concerns here are perhaps best illustrated by using a hypothetical, as follows:

Employer A, who runs a day-care center, terminated Employee X, believing that Employee X used poor judgment in supervising playground activities and that several children suffered injuries as a result. The circumstances of these injuries were such that a factfinder might disagree with Employer A that the injuries were fairly attributable to Employee X’s supervision.

Employee X subsequently applies for work with Employer B, who operates a different day-care center in the same city. Employer A learns that Employee X is seeking employment with Employer B. Concerned that Employer B may not know of Employee X’s experiences with Employer A, and that children could be endangered as a result, Employer A telephones Employer B and volunteers that she terminated Employee X because “Employee X used poor judgment in supervising children’s activities, with the result that some children were injured.” As a result of Employer A’s communication, Employer B decides to choose another candidate instead of Employee X.

Under the circumstances of this hypothetical, application of the “bright-line” reformulation of the “excessive publication” test would result in Employer A’s forfeiture of the privilege, despite her good intentions, because she volunteered the information to a person who did not request it. I believe that Employer A’s forfeiture of the privilege under these circumstances (if she is to forfeit the privilege) should *not* be based on the fact that she was a “volunteer,” as Employer A reasonably believed that Employer B would use the information for the purpose giving rise to the privilege. Here, I would argue that the real issue is whether Employer A should forfeit the privilege

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134. In this regard, litigants and their counsel should find it relatively easy to predict whether a factfinder would agree that the defendant provided information in response to a request; it is likely more difficult for parties and their counsel to predict whether a factfinder would agree that a defendant who has communicated a defamatory reference reasonably believed the recipient to be entitled to receive it.

because she may have recklessly disregarded the possibility that she was mistaken in believing Employee X to be culpable in the circumstances leading to the children's injuries. This hypothetical situation best illustrates, for me, the concerns that weigh against reformulation of the "excessive publication" standard as a "bright-line" test requiring that the employer must wait for a request before providing reference information to enjoy the benefit of the qualified privilege.

For the above reasons, while acknowledging that there are good arguments for discontinuation or modification of the "excessive publication" standard as currently applied, I believe that the standard should be retained in its current form.

### 5. *Inclusion of Irrelevant Defamatory Matter*

Traditionally, a publisher of defamatory matter has forfeited the privilege that would otherwise protect the communication if the publisher communicated defamatory matter that he or she did not believe reasonably necessary to further the interest giving rise to the privilege.<sup>135</sup> Once again, our four criteria suggest that this "relevancy requirement" standard, for reasons largely analogous to those supporting retention of the "excessive publication" test.

As to our first criterion, it seems fair and reasonable to permit employers to publish damaging reference information concerning an applicant *only* if that damaging information reasonably relates to the applicant's suitability for employment. Consider a homophobic employer who, falsely believing a former employee to be gay, tells a prospective employer (who is known by the former employer to be similarly homophobic) that the former employee is "gay and thus obviously less appealing than a straight guy would be as a candidate for employment."<sup>136</sup> Assuming that the former employee's sexual preferences (whatever they might be) never manifested themselves in inappropriate workplace conduct, this information does not seem to have any relevance to the applicant's suitability for employment and, I submit, should not be protected by the qualified privilege. Thus, it seems fair and reasonable to require employers to ensure that the information they communicate to prospective

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135. See RESTATEMENT (SECOND) OF TORTS § 605 (1977) ("One who upon an occasion giving rise to a conditional privilege publishes defamatory matter concerning another, abuses the privilege if he does not reasonably believe the matter to be necessary to accomplish the purpose for which the privilege is given"); *id.* at § 605A ("One who upon an occasion giving rise to conditional privilege publishes defamatory matter concerning another that is within the privilege, abuses the privilege if he also publishes unprivileged defamatory matter.") See also PROSSER, *supra* note 68, § 115, at 832 ("qualified privilege does not extend . . . to the publication of irrelevant defamatory matter with no bearing upon the public or private interest which is entitled to protection.")

136. In my view, an allegation that an individual is homosexual, even if false, would not be deemed defamatory in an enlightened community. Unfortunately, the current prevalence of homophobic attitudes suggests that this allegation *would* damage an individual's reputation in many communities and thus the allegation may be found to be defamatory.

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employers has a reasonable nexus to the applicant's suitability for employment.

Applying the second criterion, it seems that this "relevancy requirement" helps to safeguard employees' legitimate interests in protecting their reputations and privacy. It should discourage employers from disseminating to prospective employers information that has little or no reasonable nexus to the applicant's employability, but that nonetheless might injure the applicant's prospects (or future reputation) with the inquiring employer. Our third criterion may weigh against continued use of the "relevancy" test, as the test could encourage litigation over reference communications. An employer may feel strongly that certain defamatory information does reasonably relate to an applicant's suitability for employment, while the applicant may feel strongly that the defamatory matter is not relevant to the applicant's likely job performance. In these circumstances, the "relevancy" standard encourages the parties to litigate the matter and submit the matter to a factfinder who will decide the question.

This point again leads us to the fourth criterion, the consideration of alternative standards. Here, one possible alternative would be to *presume* the relevancy of information communicated by a former employer to a prospective new employer, as long as that information were communicated in the context of a conversation addressing the applicant's suitability for employment. This "bright-line" test, like the one considered in the previous section as an alternative in the "excessive publication" context, has at least two positive consequences: (1) Employers would be relieved of the need to exercise judgment and discretion in evaluating whether particular information reasonably relates to an applicant's employability, and thus may feel encouraged to be more open in discussing the applicant; and (2) the incentives to litigate disputes over the relevancy of the information communicated would again be eliminated (or at least reduced) by the "bright-line" nature of the test.

Again, as in the previous section, I concede these possible advantages of a "bright-line" reformulation of this standard. Again, however, I do not favor adopting such a "bright-line" reformulation, because I do not feel that we impose an unfair burden on employers if we require them to exercise judgment in deciding if reference information has a reasonable nexus to a former employee's suitability for employment. Furthermore, I believe that the second criterion (protection of employees' legitimate reputational and privacy interests) weighs strongly enough in favor of the "relevancy" standard to require that it be retained, despite the added incentives for litigation.

In short, while acknowledging that there are good arguments for discontinuation or modification of the "relevancy" standard as currently applied, I believe that the standard should be retained in its current form.

6. *Summary of the Proposed Clarifications of the Standards for Forfeiture of the Qualified Privilege*

Having evaluated separately each of the principal standards currently used to determine when the qualified privilege will be lost, it may be useful here to summarize the results of that evaluation. As explained above, I believe that states should clarify and, where necessary, *change* the current standards by specifying that a former employer giving an employment reference will forfeit the qualified privilege *only* if the employer communicated false and defamatory reference information and in doing so:

- (1) knew the defamatory matter to be false or acted with reckless disregard as to its truth or falsity;
- (2) published the defamatory matter to persons not reasonably believed to be persons to whom the communication was important and thus privileged; *or*
- (3) included defamatory matter not reasonably believed to be necessary to accomplish the purposes for which the communication is privileged.

These standards would apply to determine forfeiture of the qualified privilege in the context of defamation claims and claims of tortious interference with prospective economic advantage or prospective contractual relation.<sup>137</sup>

For the reasons stated in the preceding sections, I believe that these clarifications will best serve the goals of clarifying the legal framework governing employment references and encouraging employers to provide employment references responsibly. In many states, these "clarifications" of the standards will require discontinuing the use of a "malice" (or "improper purpose") test for forfeiture of the qualified privilege protecting employment reference communications. Part IV of this Article proposes legislation by which states can effectuate these clarifications of the law in these respects.<sup>138</sup>

137. The reader will recall that a "qualified privilege" closely analogous to that applied in the defamation context generally applies in the context of claims of tortious interference with prospective economic advantage or prospective contractual relations: *See supra* notes 71-72 and accompanying text.

The reader should note that the plaintiff who seeks to show the defendant's abuse of the privilege using only the second or third prongs of the standard set forth above *may* also be required, in establishing the plaintiff's prima facie case, to prove at least some level of fault (perhaps negligence) on the part of the defendant with respect to the defendant's efforts to investigate the truth of the defamatory statements. *See supra* note 91 and accompanying text (discussing the Supreme Court's *Gertz* decision and its requirement that states not impose defamation liability upon defendants who were without fault).

138. In 1993, the Conference of Commissioners on Uniform Acts approved the Uniform Correction or Clarification of Defamation Act ("Correction Act"). If adopted by states as proposed by the Commissioners, the Correction Act would create incentives for early settlement of defamation disputes, principally by precluding plaintiffs from recovering general and punitive damages when a publisher of a defamatory statement corrects or clarifies the statement in a timely manner. *See Ackerman, supra* note 119 (describing the circumstances leading to the Commissioners' approval of the Correction Act and analyzing the Act's provisions). A detailed discussion of the Correction Act is beyond the scope of this

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### B. *Adoption of a Limited Affirmative Duty to Disclose*

As explained in Part II, general principles of our tort law have been interpreted not to impose an affirmative duty on employers to respond to requests for reference information about their former employees.<sup>139</sup> Part II also discussed how this absence of a legal duty encourages employers to adopt "no comment" reference policies, as the law currently provides no substantial, tangible detriment for employers who decline to provide reference information in response to requests.<sup>140</sup> This section proposes that states should change the law in this respect and impose a limited duty on employers to respond to reference inquiries, following principles set forth in the seminal case of *Tarasoff v. Regents of University of California*.<sup>141</sup> In appropriate circumstances, an employer's breach of this duty could cause the employer to be liable in tort for injuries caused to third parties by the employer's former employee, if the employer withheld reference information that might have prevented the injuries.

#### 1. *Conceptual Underpinnings of the Duty: The Tarasoff Case*

The duty of disclosure proposed in this section has its conceptual roots in the *Tarasoff* case, decided by the Supreme Court of California in 1976. A brief review of *Tarasoff* provides helpful background for the analysis that will follow.

On August 20, 1969, Prosenjit Poddar confided to his therapist, a psychologist at the University of California at Berkeley, that Poddar intended to kill an unnamed girl, readily identifiable from the context as Tatiana Tarasoff. After receiving this information, the psychologist requested the campus police to detain Poddar; the campus police did briefly detain Poddar, but released him when he appeared to be rational and promised to stay away

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paper; suffice it to say here that I believe that the Correction Act would complement, rather than conflict with, the legislation I have proposed here, and that states could enact both model statutes to operate in tandem in this context.

As Professor Ackerman noted, one impetus for the Correction Act was the relative inefficacy of existing state retraction statutes. *Id.* at 335. These statutes, in force in 33 states, generally permit publishers of defamatory matter to limit the damages they may be required to pay by publishing timely retractions of the defamatory statements. The existing retraction statutes generally apply, however, only to certain types of publishers (usually media defendants), *id.* at 335 n.239, and thus have little bearing on the issues addressed in this article. The Correction Act, if adopted by states, would apply to all defendants. *Id.*

139. See *supra* note 77 and accompanying text.

140. See *supra* pp. 66-67.

141. 551 P.2d 334 (Cal. 1976). Several commentators have recognized the potential value of extending the *Tarasoff* principles to the employment reference context and/or argued that states should do so by judicial innovation or legislative action. See, e.g., Lewis *et al.*, *supra* note 28, at 834-35 & n. 253; Swerdlow, *supra* note 28, at 1667-71 Cf. Ann M. Barry, Note, *Defamation in the Workplace: The Impact of Increasing Employer Liability*, 72 MARQ. L. REV. 264, 301 (1989).

from Tatiana. The psychologist's supervisor then directed that no further action should be taken to detain Poddar. The psychologists and police officers involved in the matter did not warn Tatiana or her parents about the intentions Poddar had stated. On October 27, 1969, Poddar killed Tatiana.<sup>142</sup>

Tatiana's parents subsequently sued the Regents of the University of California and a number of individual defendants.<sup>143</sup> Their suit claimed, among other things, that the defendants should be held liable for Tatiana's death, because of their "failure to warn on a dangerous patient."<sup>144</sup> In response to this claim, the defendants argued that they breached no duty to Tatiana or her parents in the circumstances leading to Tatiana's death, and that they thus could not be held liable for their failure to warn Tatiana or her parents of Poddar's stated intentions.<sup>145</sup>

In analyzing the Tarasoffs' claim, the Supreme Court of California, sitting *en banc*, acknowledged that the common law of torts generally imposes no duty on a person to control the conduct of another dangerous person or to warn others who might be endangered by that dangerous person's conduct.<sup>146</sup> The court recognized, however, that the common law has created an exception to this general rule where the putative defendant stands in some "special relationship" with the dangerous person or with the dangerous person's foreseeable victim.<sup>147</sup>

Applying this traditional common law principle to the Tarasoffs' claim, the court held that the special relationship between a patient and his or her psychotherapist provided the basis for imposing an affirmative "duty to warn" on the psychotherapist for the benefit of third persons. Specifically, the court held that a psychotherapist may be required in the exercise of reasonable care to warn the potential victim when a patient under the therapist's care appears to present a serious danger of violence to that victim. In reaching this conclusion, the court acknowledged that psychotherapists may have difficulty evaluating and predicting when a patient is truly dangerous; the court also acknowledged that its decision could erode patients' trust in the confidentiality of patient-therapist communications, and thus could jeopardize patient-therapist

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142. 551 P.2d at 339-42. This paragraph states the facts as they were alleged in the civil suit Tatiana's parents brought against the Regents of the University of California and other defendants.

143. The individual defendants were police officers and psychologists involved in the episode in which Poddar was initially detained. The Regents of the University of California were sued as the employer of the individual defendants. *Id.* at 340.

144. *Id.* at 341.

145. *Id.* at 342.

146. *Id.* at 342-43.

147. *Id.* at 343. In this regard, the court cited with approval Restatement (Second) of Torts § 315 (1977):

[A] duty of care may arise from either (a) a special relation . . . between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation . . . between the actor and the other which gives the to the other a right of protection. *Tarasoff*, 551 P.2d at 343.



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relationships. After discussing these policy concerns in considerable detail, the court stated:

We conclude that the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins.<sup>148</sup>

The court further explained its rationale as follows:

Our current crowded and computerized society compels the interdependence of its members. In this risk-infested society, we can hardly tolerate the further exposure to danger that would result from a concealed knowledge of the therapist that his patient was lethal. If the exercise of reasonable care to protect the threatened victim requires the therapist to warn the threatened party or those who can reasonably be expected to notify him, we see no sufficient societal interest that would protect and justify concealment. The containment of such risks lies in the public interest.<sup>149</sup>

The *Tarasoff* decision has been widely followed since it was announced in 1976, although some subsequent decisions have cut back on the breadth of the duty that *Tarasoff* appeared to impose.<sup>150</sup> Some commentators have argued that the *Tarasoff* rationale could also be used to support the adoption of an affirmative duty to warn in contexts other than the psychotherapist-patient relationship.<sup>151</sup>

### 2. *Theoretical Support for the Proposed Rule: Applying Tarasoff's Rationale and Principles in the Employment Reference Context*

The policies underlying the California Supreme Court's decision in *Tarasoff* seem to apply with equal force in the employment reference context. The traditional common law doctrines on which the court relied to support the imposition on therapists of a "duty to warn" also seem applicable in the employment reference context and support the imposition on employers of a limited "duty of disclosure."

The policy concerns supporting *Tarasoff's* imposition on therapists of a "duty to warn" apply in the employment reference context and support imposition on employers of a limited "duty to disclose." The court in *Tarasoff* justified its decision by stressing the possibility that warnings given by therapists pursuant to the duty could permit potential victims to avoid injury at the hands of dangerous patients. The employment reference context seems

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148. *Tarasoff*, 551 P.2d at 347.

149. *Id.* at 347.

150. In *Thompson v. County of Alameda*, for example, the Supreme Court of California applied the *Tarasoff* principle but limited it somewhat, holding that a government agency had a "duty to warn" the potential victim of a dangerous detainee, whom the agency released only if the potential victim of the dangerous individual was "readily identifiable." *Thompson v. County of Alameda*, 614 P.2d 728, 738 (Cal. 1980). See also *Brenneman v. State of California*, 256 Cal. Rptr. 363 (Cal. Ct. App. 1980).

151. See, e.g., Marc Sands, *The Attorney's Affirmative Duty to Warn Foreseeable Victims of a Client's Intended Violent Assault*, 21 TORT & INS. L.J. 355 (1986) (suggesting that attorneys should be held to *Tarasoff* duty to warn foreseeable victims of a client's intended assault).

closely analogous, as prospective new employers, their employees and members of the general public may be able to avoid unnecessary exposure to potential harm if former employers are required to disclose information that would warn a prospective new employer of an applicant's dangerous or criminal tendencies. The public safety rationale underlying the *Tarasoff* "duty to warn" thus supports extension of an analogous "duty to disclose" in the employment reference context.

The traditional common law doctrines used by the California Supreme Court to support imposing on therapists a "duty to warn" also can be used to support imposing on former employers a "duty to disclose" particular types of reference information. The California court relied on the "special relationship" between psychotherapist and patient as the basis for imposing on therapists an affirmative duty to warn third parties. The employer-employee relationship seems closely analogous in pertinent respects to the psychotherapist-patient relationship; most importantly, the employer may acquire special knowledge of an individual's dangerous or criminal tendencies in the course of the employer-employee relationship, just as a therapist may acquire special knowledge of a patient's dangerous tendencies in the course of the therapist-patient relationship. In these circumstances, the "special relationship" between employer and employee could, and I submit should, be used as the basis for imposing on the employer a duty to warn potential "third-party" victims of the employee's future conduct, just as the "special relationship" between psychotherapist and patient was used in *Tarasoff* as the basis for imposing a duty on psychotherapists to warn the identifiable targets of their patients' violence.<sup>152</sup>

In fact, the two types of relationships are so analogous that no further doctrinal support may be deemed necessary for the application of the *Tarasoff* principle in the employment reference context.<sup>153</sup> If additional doctrinal support is deemed necessary, that support may be found in the "special

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152. In her comment proposing extension of the *Tarasoff* principle to the employment reference context, Janet Swerdlow similarly argued that the relationship between employers and their former employees could be deemed a "special relationship" that would give rise to a duty on the part of the former employer to disclose admonitory information to a prospective new employer of the former employee. Swerdlow, *supra* note 28, at 1662-63.

153. Some may argue that the "special relationship" between psychiatrists and patients is inherently different from the "special relationship" between employer and employee in that the psychiatrists' primary duties of confidentiality and loyalty with respect to their patients will restrain them from issuing unnecessary warnings, while there will be no such restraint on employers, who may therefore be overzealous in exercising their duty to warn. This danger would be limited, however, both by the employers' knowledge that they will forfeit their qualified privilege if they recklessly disregard the possible falsity of the reference information given, and by the much more limited range of information employers have about their employees than psychiatrists have about their patients. While psychiatrists are privy to patients' innermost thoughts and feelings, and are faced with the difficult task of predicting whether patients are likely to act on them, employers may only base their warnings on employee behavior at work. This more limited range of information should work to restrict employers to issuing warnings only in cases where there exists sufficient concern to warrant such a warning.

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relationship” between a job applicant’s former employer and the prospective new employer who contacts that former employer for a reference. In this regard, the Restatement notes that a duty to control the conduct of a third person (or to warn others of that third person’s conduct) may arise when “a special relation exists between the actor and the other which gives to the other a right of protection.”<sup>154</sup> One type of “special relationship” that has given rise to a duty to aid or protect another is a relationship in which the party at risk of injury is *dependent* on the other.<sup>155</sup>

One could argue, as Janet Swerdlow has in a thoughtful comment on this topic, that a prospective employer contacting a job applicant’s former employer has a “*dependency*” on the former employer that is analogous to the “dependencies” giving rise to the duties of protection described in Restatement (Second) § 314A. In Swerdlow’s words, “[b]ecause it is foreseeable that certain information regarding the job applicant’s suitability for employment would not be known by anyone other than the applicant’s former employer, [the prospective new employer] is dependent upon [the former employer] to provide this valuable information.”<sup>156</sup> Thus, the “special relationship” between the prospective new employer and the applicant’s former employer suggests an additional basis under traditional common law doctrine for the imposition on the former employer of a limited duty of disclosure.

One last point warrants mention in this discussion of the possible application of the *Tarasoff* principle in the employment reference context. The court in *Tarasoff* acknowledged that significant policy concerns weighed against the court’s imposition on therapists of a “duty to warn,” even if those concerns were outweighed by the policy concerns supporting imposition of the duty. The court’s main concern was the requirement that therapists could be forced to disclose information that patients might view as confidential, and that patient-therapist relationships could be jeopardized as a result. This concern is not one

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154. RESTATEMENT (SECOND) OF TORTS § 315(b) (1977).

155. Restatement (Second) § 314A gives the following as examples of these types of “dependency” relationships and the duties to which they give rise:

§ 314A. SPECIAL RELATIONS GIVING RISE TO DUTY TO AID OR PROTECT

(1) A common carrier is under a duty to its passengers to take reasonable action

(a) to protect them against unreasonable risk of physical harm, and  
(b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.

(2) An innkeeper is under a similar duty to his guests.

(3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.

(4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

RESTATEMENT (SECOND) OF TORTS § 314A (1977). *See also id.* at cmt. b (“The law appears . . . to be working slowly toward a recognition of duty to aid or protect in any relation of dependence or mutual dependence.”).

156. Swerdlow, *supra* note 28, at 1661.

that arises in the employer-employee context.<sup>157</sup> Accordingly, the arguments for imposition on employers of a "duty of disclosure" may in certain respects be even stronger than the arguments in *Tarasoff* for imposition on therapists of a "duty to warn," at least so long as the employer's "duty of disclosure" is properly defined and limited.

3. *Setting Limits: Defining Appropriate Parameters for Employers' Duty of Disclosure*

The "duty of disclosure" proposed in this section must be properly defined and limited if it is to accomplish its goal of encouraging the responsible dissemination of reference information by employers. Three questions seem particularly important as we consider appropriate limits on the duty. First, what circumstances will trigger an employer's duty to disclose admonitory information about a former employee to a prospective new employer of that employee? Second, what, if any, limits should there be as to the types of information about a former employee that a former employer would be required to disclose pursuant to this duty? Third, how should we treat circumstances in which an employer suspects—but cannot document or otherwise prove—that a former employee has engaged in conduct the knowledge of which would cause the employer to have a duty of disclosure under the framework proposed here? This section attempts to answer these questions.

In response to the first question, I would argue that any attempt (legislative or judicial) to effectuate the "duty of disclosure" proposed in this section should clearly specify the circumstances under which such a duty would arise. I propose that former employers should not have a duty to disclose admonitory information about a former employee *unless and until a prospective new employer of that employee contacts the former employer for reference information*. In other words, a former employer would *not* be required to attempt *sua sponte* to identify and contact a former employee's prospective new employer(s) to volunteer admonitory information about the former employee. While employers could conceivably be required to act as "volunteers" in this fashion, administrative and practical concerns suggest that it would not be fair or reasonable to require them to do so; moreover, the prospect of liability for "negligent hiring" should already be strongly encouraging prospective employers to contact their applicants' former employers for reference

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157. An arguably analogous concern may be present in the damage to former employees' reputations that could result if employers are compelled to disclose information that the employers may have withheld in the absence of the "duty to disclose" proposed by this section. In the context of discussing the appropriate standards for forfeiture of the qualified privilege, Section III.A. sets forth my views as to how our concern for employees' reputations should be weighed and addressed. See discussion *supra* notes 115-138 and accompanying text.

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information. For these reasons, I believe that it is most appropriate and feasible to limit a former employer's "duty of disclosure" so that it will arise only after the former employer has received a request for reference information.

With regard to the second question, I believe that there should also be limits on the types of information about a former employee that a former employer would be required to disclose pursuant to the duty proposed here. I propose that former employers should not have a duty to disclose admonitory information about a former employee to a prospective new employer *unless that information appears reasonably necessary to avert the risk of physical injury to the prospective employer, the prospective employer's employees, or the members of the public with whom the prospective employer's employees will come in contact.*<sup>158</sup> My reasons for proposing this limit relate back to the policy concerns used to support the creation of the duty. Specifically, I—like the court in *Tarasoff*—would ground the duty to warn or disclose principally upon the public policy of averting avoidable harms to the potential victims of violent or otherwise dangerous conduct. Thus, an employer would *not* generally be required under the duty proposed here to warn a prospective new employer that a former employee dressed badly, used profanity, made book-keeping errors, had an abrasive personality, or was generally incompetent.<sup>159</sup> On the other hand, an employer *would* generally be required to warn an inquiring prospective new employer that a former employee had engaged in fights or other violent altercations while at work, had exhibited a violent temper, had sexually harassed coemployees, or had performed job tasks negligently in circumstances where injury to others did result or may have resulted.<sup>160</sup>

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158. In her comment proposing adoption of the *Tarasoff* duty in the employment reference context, Janet Swerdlow suggested a somewhat broader obligation of disclosure, under which the employer would have to disclose any traits of the applicant that could pose a danger to the prospective employer's "property, employees or others with whom the applicant could foreseeably come into contact as a result of the employment." As examples of the conduct that would give rise to the duty of disclosure, Swerdlow included "possession, use, or sale of drugs, sexual or racial harassment, acts of violence, theft, discrimination, sexual misconduct, willful destruction of property, possession of weapons in the work place, safety violations, improper disposal of toxic waste, lack of competence and falsification of credentials." Swerdlow, *supra* note 28, at 1653. As is clear from the limits I propose, I believe that the duty of disclosure urged by Swerdlow is too broad, given the tort doctrines and the particular policy reasons (i.e., social safety concerns) on which the *Tarasoff* duty was grounded.

159. A duty to warn that the former employee was incompetent might arise, however, if the employee's incompetence either had caused, or could conceivably cause, risks of physical injury to the prospective new employer, the applicant's future coemployees or members of the public. By way of example, a former employer would be required to warn a prospective new employer that the applicant involved was an incompetent operator of heavy machinery, as incompetence in that area poses risks of injury to others.

160. I concede that the test I propose is not a "bright-line" test, and that the rule proposed here may require employers to make some difficult judgments as to whether or not an unfavorable attribute of a former employee involves sufficient risk of injury to others to trigger the "duty of disclosure" proposed. I believe that a responsible and well-advised employer should—and will—err on the side of disclosure when confronted by these close calls, in light of the protection from liability provided by the qualified privilege discussed in Section III.A. For this reason—and because the proposed "duty of

As to the third question, I believe that any attempt to enact or adopt the "duty of disclosure" proposed in this section must ensure that an employer is adequately protected from liability to a former employee if the employer is compelled by the duty to disclose admonitory information that the employer may not be able to support with hard evidence. Without adequate protection in this regard, employers will likely feel caught between the Scylla of potential liability to those who might be injured by the former employee and the Charybdis of potential defamation liability to the former employee if the employer cannot show that the damaging reference was truthful. Although this issue is important, the solution is fairly straightforward—I would argue that the qualified privilege and the particular conditions that are established for forfeiture of the qualified privilege, as detailed in Part III.A, give employers all the protection from liability that is necessary and appropriate in these circumstances.

By way of illustration, consider an employer who terminated an employee because of the employer's belief—reached after reasonable investigation—that the employee had driven company trucks on company business while intoxicated. The former employer would be required by the duty proposed here to warn a prospective new employer of the reason the former employee was terminated, even if the former employer could not offer conclusive proof that the employee had been intoxicated while on duty. The employer in these circumstances should, however, advise the prospective new employer of the fact that the former employer had not been able to prove conclusively that the former employee had been intoxicated while at work.

In these circumstances, the former employer's communication of the admonitory information to the prospective new employer would be protected by the qualified privilege, and the employer should be able to establish that the privilege was *not* abused. Specifically, even if a factfinder were to conclude that the former employer had been incorrect in believing that the former employee was intoxicated while on the job, the employer in the facts of the hypothetical did *not* (1) disseminate the damaging reference information knowing it to be false or recklessly disregarding the possibility that it was false; (2) publish the damaging reference to a person without a "need to know"; or (3) include defamatory matter not reasonably believed to be relevant to the applicant's suitability for employment.<sup>161</sup> Thus the employer in this

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disclosure" will preclude employers from using a *blanket* "no comment" policy—the "duty of disclosure" proposed here should have a spillover effect, encouraging employers to provide reference information even when their disclosure obligations under this proposal would not technically require them to do so. If this spillover effect occurs, the result of the rule is again to encourage a freer flow of reference information, permitting prospective employers to make hiring decisions based on more complete information.

161. The reader will recall that these are the three circumstances that will cause the publisher of a false, damaging reference to forfeit the protection of the qualified privilege. See discussion *supra* notes

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hypothetical would avoid liability even if he or she were mistaken. Generally, employers should feel reassured that the total framework of rules proposed by this Article gives them reasonable protection from liability if they act responsibly. The model legislation included in Part IV suggests language that state legislatures could use to adopt the “duty of disclosure” proposed in this section and to limit that duty in accordance with the parameters suggested above.

### C. Attorney Fee Shifting

As discussed in Part II, the “American Rule” concerning litigants’ responsibilities for attorneys’ fees ensures that an employer will generally be obligated to pay significant fees to attorneys if forced to defend its reference practices, even if the employer is ultimately successful in doing so.<sup>162</sup> Part II also explained how this “American Rule” strongly encourages employers to adopt “no comment” reference policies.<sup>163</sup> This section proposes that states should change employers’ and employees’ incentives in this context by adopting a limited “fee-shifting” rule to be applied in litigation in which aggrieved former employees sue their former employers on account of an unfavorable employment reference.<sup>164</sup> The rule proposed here would allow litigants, in particular circumstances, to recover their reasonable attorneys’ fees and expenses if they prevail in litigation over an employment reference.<sup>165</sup>

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118-19 and accompanying text.

162. See discussion *supra* note 115 and accompanying text. Some commentators have noted that employers’ liability insurance policies might cover some defamation claims based on employment references, and that the insurer’s obligations under the policy might include payment of attorneys’ fees incurred in defending those claims. See, e.g., Swerdlow, *supra* note 28. I believe that this factor does not diminish the importance of the attorney fee-shifting prong of the comprehensive proposal made in this article, for two principal reasons. First, while some employers’ liability insurance policies may potentially cover these types of litigation claims, not all do. (Some employers’ liability insurance policies, for example, contain riders expressly excluding coverage of defamation claims arising out of workplace statements by the employer or the employer’s agents.) Second, even for those employers whose insurance policies may cover potential liability and litigation expenses incurred in defending lawsuits based on employment references, the fee-shifting rule is desirable because of the incentives it creates. Specifically, the fee-shifting rule should discourage plaintiffs from filing marginal claims because the frivolous plaintiff will potentially assume responsibility for the defendant’s attorneys’ fees. See discussion *infra* pp. 101-102. If reassured that the fee-shifting rule will discourage “nuisance-value” litigation claims, even employers who believe that their liability insurance may cover those claims should feel encouraged by the fee-shifting rule to adopt open reference strategies.

163. See discussion *supra* p. 76.

164. Other commentators have recognized the potential beneficial effects of attorney fee-shifting approaches in the defamation context. See, e.g., Ackerman, *supra* note 119, at 336 (arguing for the application, in most or all types of defamation claims, of fee-shifting rules analogous to the one proposed in this article).

165. William W. Schwarzer, the past Director of the Federal Judicial Center in Washington, D.C., recently proposed revision of Rule 68 of the Federal Rules of Civil Procedure to permit shifting of attorneys’ fees in the context of offers of judgment or settlement pursuant to Rule 68. See Anthony E. Diresta, *Proposed Revisions to Rule 68 Would Shift Attorneys’ Fees, Not Just Costs*, 19 LITIG. 1 (Apr. 1993). As of publication, the Advisory Committee on the Federal Rules of Civil Procedure had decided to table their proposal, at least for the present; a similar proposal was considered by the Advisory

The particular circumstances in which this fee-shifting would take place are explained below.

1. *The Proposed Fee-Shifting Rule*

The fee-shifting rule I propose would apply in litigation in which aggrieved former employees sue their former employers on account of unfavorable employment references. The rule would allow a prevailing litigant to recover from his or her opponent reasonable attorneys' fees and expenses incurred in that type of litigation, according to the circumstances set forth below.

First, a prevailing plaintiff could recover reasonable attorneys' fees and expenses from the losing defendant if the factfinder specifically finds (1) that the defendant disseminated false and derogatory reference information concerning the plaintiff, *and* (2) that in disseminating the false information, the defendant abused and forfeited the qualified privilege that would normally protect reference communications.<sup>166</sup>

Second, a prevailing defendant could recover reasonable attorneys' fees and expenses from the losing plaintiff if the factfinder specifically found that the unfavorable employment reference that gave rise to the plaintiff's complaint was *substantially true and was not false in any material respect*.<sup>167</sup>

Third, a prevailing defendant could *not* recover attorneys' fees and expenses from the losing plaintiff if the defendant prevailed in the litigation only by virtue of the qualified privilege. In other words, the defendant could not recover fees and expenses from the plaintiff if the factfinder determined that the reference that gave rise to the litigation was false and defamatory, but the factfinder also found that the defendant employer did not abuse and forfeit the qualified privilege. In these circumstances, the normal "American Rule" would apply and both litigants would be responsible for their own attorneys' fees and expenses incurred in the litigation.

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Committee in 1984 and was not approved. Congress is now considering legislation that would, among other things, permit prevailing litigants in certain circumstances to recover their attorneys' fees from their opponents.

166. The circumstances under which an employer would be deemed to have abused and forfeited the qualified privilege protecting reference communications were discussed in Part III.A. and are summarized *supra* pp. 133-34. The conditions set forth here for the plaintiff's recovery of fees suggest that *any* prevailing plaintiff in litigation of this type should be able to recover his or her reasonable fees and expenses, for the elements that the plaintiff must prove in order to prevail in the litigation are identical to the elements the plaintiff must prove in order to recover fees and expenses from the losing defendant.

167. As clarified in the proposed legislation included in Part IV, however, the prevailing defendant would not be permitted to recover fees and expenses from the losing plaintiff if the employment reference provided by the defendant included derogatory information concerning the plaintiff that was substantially true but was not relevant to the plaintiff's suitability for employment. In these circumstances, the defendant would not have technically abused the privilege—because the defendant's statements were not false—but the defendant's conduct would not seem to justify the defendant's recovery of fees from the aggrieved plaintiff.



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These three rules are detailed in the model legislation included in Part IV. The proposed legislation also specifies certain other important practical aspects for implementation of the fee-shifting rule. The rule contemplates and the model legislation specifies, for example, that the "special findings" needed to determine the application of the "fee-shifting" rule in these contexts would be accomplished by the use of appropriate special verdict forms (in a jury trial) or findings of fact (in a bench trial). The proposed legislation also specifies that an award of fees pursuant to the proposed rule will not be self-executing, but must be requested by a petition filed by the prevailing party within ten days after the entry of judgment by the trial court. Finally, the proposed rule and the model legislation specify that in order to determine whether fees should be awarded pursuant to the rule, and to calculate the appropriate amount of that fee award, courts should consider a number of equitable factors. All of these procedures and factors are detailed in the model legislation included in Part IV.<sup>168</sup>

### 2. *Analysis of the Proposed Fee-Shifting Rule: Theoretical Support, Advantages and Disadvantages*

A significant amount of scholarship has been devoted to analysis of fee-shifting proposals.<sup>169</sup> It is beyond the scope of this Article to discuss and reexamine in depth all that has been written elsewhere about the desirability (or undesirability) of potential fee-shifting approaches in the American judicial system generally. Having recognized this limitation, this section attempts to state in relatively summary fashion the theoretical support for the fee-shifting proposal made in this Article; the section also attempts to explore and compare the particular advantages and disadvantages of this proposal for fee-shifting limited to the context of litigation over employment references.

a. *Theoretical support.* Existing scholarship has discussed in detail the different circumstances in which American courts have traditionally been authorized and willing to require a losing litigant to pay the prevailing litigant's attorneys' fees.<sup>170</sup> For purposes of our analysis here, the two types of

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168. See *infra* pp. 108-113.

169. See, e.g., Symposium, *Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 1 (Winter 1984). See also John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1567-68 & n.15 (1993) (collecting citations and summarizing other articles analyzing fee-shifting proposals); Cf. Harold J. Krent, *Fee Shifting Under the Equal Access to Justice Act—A Qualified Success*, 11 YALE L. & POL'Y REV. 458 (1993).

170. In their definitive three-volume treatise on attorney fee-shifting, Mary F. Derfner and Arthur D. Wolf identified seven types of occasions in which the federal courts have been authorized to award fees to prevailing litigants:

(1) Pursuant to statutory authority; (2) where authorized by terms of a contract; (3) when the lawsuit involves a common fund of money; (4) where one of the parties, either before or during litigation, acts in bad faith; (5) when the litigation confers a substantial benefit on an

situations that are most apposite are (1) situations in which statutes have authorized fee-shifting in particular types of litigation, and (2) situations in which courts have exercised their equitable powers to sanction parties who have acted in bad faith in litigation, by requiring those parties to pay their opponents' fees.

The first situation in which courts have been willing to require losing litigants to pay their opponents' fees is when a statute or court rule authorizes or requires the court to do so. Commentators have identified over 200 federal statutes and approximately 2000 state statutes permitting either "one-way" or "two-way" fee-shifting in particular types of litigation.<sup>171</sup> Several purposes are typically identified in support of these fee-shifting statutes: "The major purpose of state fee-shifting legislation is to compensate the prevailing plaintiff, promote public-interest litigation, punish or deter the losing party for misconduct, or prevent abuse of the judicial system."<sup>172</sup>

Each of these purposes supports adoption of the fee-shifting rule proposed in this section for litigation over employment references. If enacted, the fee-shifting rule proposed here should compensate plaintiffs who prevail in litigation over an employment reference more fully and fairly than the present system does.<sup>173</sup> The rule should also punish losing parties who have engaged in misconduct by taking insupportable positions in litigation, and should deter other litigants from engaging in similar misconduct.<sup>174</sup> By creating these incentives, the rule should assist in preventing abuse of the judicial system. Finally, the fee-shifting rule proposed here should promote the public interest in at least two ways in addition to those identified above: (1) by encouraging plaintiffs and defendants with especially strong and meritorious claims to pursue those claims through litigation, because of the prospect of recovering fees after prevailing in litigation; and (2) by encouraging employers to adopt open reference policies, because plaintiffs bringing unwarranted claims against employers may be required to reimburse the employer for the fees incurred by

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ascertainable group of persons; (6) where a party disobeys a court order (contempt); and (7) whenever state law authorizing fees is applicable.

MARY F. DERFNER & ARTHUR D. WOLF, 1 COURT AWARDED ATTORNEY FEES ¶ 1.01, at 1-3 (1987) (footnotes omitted).

171. See Vargo, *supra* note 169, at 1588. See also DERFNER & WOLF, *supra* note 170, Table of Statutes TS-1—TS-36 (listing statutes, with cross references to sections permitting fee-shifting); Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, in LAW & CONTEMP. PROBS. (Winter 1984), at 321, 328-45 (describing approximately 2000 state statutes permitting fee-shifting). "One-way" fee-shifting statutes typically permit only a prevailing plaintiff to recover attorneys' fees from the losing defendant; "two-way" fee-shifting statutes permit both prevailing plaintiffs and prevailing defendants to recover their attorneys' fees from their unsuccessful litigation opponents.

172. Vargo, *supra* note 169, at 1588.

173. See discussion *infra* pp. 167-69.

174. See discussion *infra* at p. 167.

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the employer to defend the claims.<sup>175</sup> Thus, virtually all of the purposes that have been invoked in support of other federal and state fee-shifting legislation seem to apply in the employment reference context and support adoption of the fee-shifting rule proposed here.

A second type of situation in which courts have been willing to require losing litigants to pay their opponents' attorneys' fees involves circumstances in which a party has litigated in "bad faith." In this regard, the United States Supreme Court noted in a 1974 decision, and reaffirmed in a 1991 decision, that federal courts in the exercise of their equitable powers may award attorneys' fees "to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."<sup>176</sup> It appears that many state courts, by statute or practice, have likewise been permitted to award attorneys' fees against a litigant who has acted in bad faith.<sup>177</sup>

The widespread recognition of "bad faith" as a permissible basis on which to predicate fee-shifting supports the adoption of the fee-shifting approach recommended by this section. Specifically, the fee-shifting rule proposed here authorizes the court to award attorneys' fees (1) against a plaintiff, if the factfinder determines that the reference prompting the plaintiff's complaint was substantially true and not false in any material respect and that the defendant did not publish irrelevant damaging information; and (2) against a defendant, if the defendant disseminated damaging, false reference information and abused the qualified privilege in doing so. In both of these circumstances, the findings that the factfinder must make to permit the shifting of fees seem tantamount to a finding that the litigant acted in bad faith in provoking the claim or pursuing it in litigation.<sup>178</sup> If this reasoning is accepted—and the conditions required by the proposed rule for fee-shifting to take place are deemed a reasonably fair "proxy" for the presence of "bad faith" on the part of the litigant against whom fees are assessed—the traditional "bad faith" exception to the usual American rule on allocation of attorneys' fees provides additional theoretical support for the fee-shifting rule proposed here.<sup>179</sup>

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175. See discussion *infra* at p. 167.

176. *F.D. Rich Co. v. United States ex. rel. Indus. Lumber Co.*, 417 U.S. 116, 129-30 (1974); see also *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991).

177. See DERFNER & WOLF, *supra* note 170, ¶ 4.03, at 4-23 ("many states, pursuant to statute or practice, allow fees based on a litigant's bad faith").

178. Professor Ackerman has made similar arguments (*e.g.*, respecting the application of "bad faith" principles) in support of the fee-shifting regime he proposed in his article discussing possible broad reforms in defamation law. See Ackerman, *supra* note 119, at 336.

179. The reader may remark that the proposed fee-shifting rule does not seem to change the existing framework significantly, if the courts already have the power to award attorneys' fees against a party who has litigated in bad faith. The proposed fee-shifting rule *does* significantly change the existing framework, however, principally because the proposed rule would make the shifting of fees in these circumstances *presumptive*, rather than merely possible. The result would be to require the party from whom fees are sought to persuade the court that equitable considerations permit the court to reduce or

b. *Advantages.* The principal advantage of the fee-shifting rule proposed here is its potential to change employers' and employees' incentives respecting employment reference practices and, more specifically, their incentives with regard to litigation over those practices. The proposed rule also permits fuller and fairer compensation of parties who have been unjustifiably compelled to litigate claims over an employment reference. These general benefits of the rule may be broken down into four specific types of benefits.

First, the rule should encourage employers to adopt open reference policies. As discussed in Part II, employers are currently discouraged from adopting open reference policies, as our current system usually requires employers to pay significant attorneys' fees if forced to defend their reference practices, even if those practices were reasonable and defensible. The fee-shifting rule proposed here should thus have the desirable effect of encouraging employers to provide references more freely.

Second, the proposed fee-shifting rule should reinforce and strengthen the already-present incentives for employers to use good management techniques in gathering and disseminating reference information. The rule will reward employers, by permitting them to recover their attorneys' fees from the losing plaintiffs, if they are able to show that the unfavorable reference they disseminated was substantially true and was not false in any material respect. The possibility of recovering these fees if sued on account of an employment reference (and the desire to avoid having to pay the plaintiff's attorneys' fees) should encourage employers: (1) to investigate carefully and document the information to be included in an employment reference; (2) to exercise good judgment by disseminating reference information only to persons with a legitimate interest in receiving it; and (3) to exercise good judgment by disseminating reference information only if that information is reasonably related to the applicant's suitability for employment. Since taking these sensible precautions will increase the likelihood that employers will recover attorneys' fees from plaintiffs who challenge them unsuccessfully—or at least will avoid having to pay the plaintiffs' attorneys' fees—the proposed rule appears to create desirable incentives for managers to use appropriate strategies in their employment reference practices.

Third, the proposed rule creates strong incentives for parties—whether plaintiffs or defendants—to avoid adopting and maintaining insupportable litigation positions. Plaintiffs who are aware that the employment references that offended them were substantially supported by the facts should be discouraged by the rule from even filing a claim over the reference, for the

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deny the fee award. This shift in the "burden of persuasion" on the fee-shifting issue would significantly change the current framework and the incentives it creates.

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rule deprives them of the leverage that they would usually enjoy if the employer were required to pay substantial attorneys' fees to successfully defend the reference. On the other hand, employers who have disseminated false reference information and abused the qualified privilege in doing so should be encouraged by the rule to think twice about forcing litigation over the aggrieved former employees' claim, for such employers may ultimately pay both their own and the plaintiffs' attorneys' fees if the plaintiffs prevail.

Finally, the proposed rule offers the prospect of fuller and fairer compensation of parties who have been unjustifiably compelled to litigate claims over employment references. Prevailing plaintiffs, wronged by employers who disseminated false reference information and abused the qualified privilege, will be more fully compensated because their damage awards will not be diminished by the attorneys' fees they incur in obtaining their favorable litigation result. On the other hand, the employer who is able to establish the truthfulness of the challenged reference has at least the prospect of recovering from the unsuccessful plaintiff the attorneys' fees that the employer incurred in defending the reference.<sup>180</sup>

In short, the proposed rule offers significant advantages over the existing legal framework by encouraging a freer flow of reference information, rewarding employers who design and implement responsible management practices respecting employment references, and discouraging frivolous litigation over employment reference disputes. The rule also permits us to compensate more fully and fairly those litigants who are unjustifiably forced into litigation over employment references.

c. *Disadvantages.* The principal disadvantages of the proposed fee-shifting rule are analogous or identical to disadvantages that have been identified and discussed in connection with other proposals for fee-shifting in our legal system. The most important of these disadvantages are: (1) the potential for the rule to "overdeter" litigants with legitimate claims; (2) the possibility that employers will be further deterred from providing reference information if the employers may become responsible for the attorneys' fees incurred by a successful plaintiff; and (3) the potential for the rule to provoke additional litigation over the application of the fee-shifting rule in particular cases.

As to the first disadvantage, one unfortunate consequence of the proposed fee-shifting rule is its potential to "overdeter" potential litigants with legitimate

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180. Obviously some—perhaps many—plaintiffs in this context will not have the resources to fully reimburse a defendant who has incurred considerable attorneys' fees. However, even if employers sometimes (or often) will be unable to recover all of their attorneys' fees from impecunious unsuccessful plaintiffs, the fee-shifting rule is still advantageous to employers, who as putative defendants in this context will benefit from the rule's tendency to discourage plaintiffs with marginal claims from pursuing them. See discussion *supra* at p. 167.

claims. By way of example, a former employee might strongly believe that a damaging employment reference given by his or her former employer was substantially false and materially misleading. This potential plaintiff may be discouraged from filing suit by the prospect of becoming responsible for the employer's fees if the employer successfully defends the reference. This undesirable deterrent effect is simply the flipside of the desirable deterrent effect discussed in the previous section (i.e., the potential for the rule to deter litigants from pursuing frivolous claims).

I concede that the fee-shifting rule proposed here does have the potential to "overdeter" some litigants with legitimate claims, especially if those litigants are particularly risk-averse. On balance, however, I believe that the benefits of this rule's tendency to deter frivolous claims outweigh the possible detriments of its potential to "overdeter" particular claimants. In reaching this conclusion, I am particularly influenced by the fact that a plaintiff in an employment reference case will *not* be responsible for a defendant's attorneys' fees under the proposed rule unless the factfinder is persuaded that the damaging reference was substantially true and not false in any material respect. Because a plaintiff will *not* be responsible for the attorneys' fees of a defendant who prevails only by virtue of the qualified privilege, I do not believe the proposed fee-shifting rule is unacceptably "overdeterrent."<sup>181</sup>

With regard to the second disadvantage, the proposed fee-shifting rule could conceivably deter some employers from providing reference information, as they realize that a plaintiff who succeeds in challenging an unfavorable reference may recover both damages and the attorneys' fees incurred in litigating the claim. This potential deterrent effect, however, should be largely offset by two factors in the proposed new framework that should strongly encourage employers to provide references. First, as discussed in the preceding section, the fee-shifting rule should discourage frivolous plaintiffs from filing "nuisance-value" suits, and employers whose reference practices are responsible should be adequately protected by the qualified privilege against both liability and responsibility for plaintiffs' attorneys' fees. Second, the proposed new framework will impose on employers a duty of mandatory disclosure in precisely the circumstances in which employers may be most tempted to retreat to a "no comment" policy—i.e., when an honest reference will disclose that the applicant involved poses a risk of injury to others. These two factors respectively encouraging and compelling employers to provide reference information should, I believe, offset the fee-shifting rule's possible

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181. The legislation proposed in Part IV also grants the court latitude to consider and make appropriate adjustments for equitable factors when determining a fee award; one of the equitable factors the court may consider in determining the award is the possibility that the award might be so onerous as to deter similarly situated litigants from pursuing similar claims in the courts. *See infra* p. 112 (model statute § 7(f)(9)).

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deterrent effect on employer reference practices.

The third principal disadvantage of the proposed fee-shifting rule is the possibility that it might engender additional litigation over how the fee-shifting rule should be applied in particular cases. More specifically, the potential for receiving a fee award under the rule—and the desire to avoid paying an opponent's fees—may encourage litigants to devote significant attention at the trial court level to motions and/or evidentiary presentations focused on the application of the fee-shifting rule; the rule might also encourage losing litigants to appeal cases that they would not otherwise appeal.

The possibility that fee-shifting rules will engender additional litigation is a fair reason for opposing them. This objection can always be made, however, when a proposal for reform gives the trial courts some discretion to implement the reform. On balance, I believe that the advantages of the proposed rule in the employment reference context outweigh this disadvantage and the others I have discussed.<sup>182</sup>

### IV. PROPOSED LEGISLATION

Practical and prudential limitations on judicial innovation suggest that legislation may be necessary or advisable for the implementation of the reforms proposed in this Article. Accordingly, this section offers model legislation by which states may implement the reforms proposed above in Part III.<sup>183</sup>

#### AN ACT

To encourage employers to adopt open, responsible employment reference practices and to assure that employment reference information is available to permit prospective employers to evaluate applicants for employment; by clarifying the legal rules governing employers'

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182. With regard to this particular disadvantage, I would note that the fee-shifting rule proposed here may not involve as much potential for encouraging additional litigation as some other fee-shifting proposals have involved. In particular, this rule should be susceptible of at least presumptive application after the factfinder has made the special factual findings required for determination of both liability and the fee-shifting consequences. Since the rule reduces the need for the court to exercise discretion as to whether fees ought to be shifted in the first instance (i.e., in the absence of countervailing equitable considerations), the rule may not be as likely to multiply litigation over fee-shifting issues as other fee-shifting proposals may have seemed to be.

183. This model legislation would most likely be considered and adopted by state legislatures. Obviously, the goal of uniformity in the law will best be served if many states quickly adopt a consistent approach, preferably through legislative enactment of identical or comparable employment reference statutes. Alternatively, Congress could act to assure uniformity in the states' treatment of these issues; federal intervention in this area, in the form of a federal employment references statute, could conceivably be based on Congress's powers under the Commerce Clause. *Cf. Ackerman, supra* note 119, at 347 n.283 (discussing possible constitutional bases for federal legislation on defamation law reform). A full discussion of the arguments for and against federal legislation in the employment reference context is beyond the scope of this article.

potential liability arising from their provision of employment references; by imposing a duty on employers to provide employment reference information in particular circumstances; and by authorizing courts to award attorneys' fees and expenses to prevailing litigants in certain circumstances after litigation challenging an employer's employment reference practices.

Section 1: Be it enacted by the Senate and House of Representatives of [ ] assembled, that this Act may be cited as "The Employment References Act of \_\_\_\_."

#### *Findings and Purpose*

Section 2: (a) The [Legislature] finds that recent legal developments have encouraged many employers to adopt what have been called "no comment" or otherwise restricted employment reference practices under which the employers refuse to comment on their current or former employees' suitability for prospective new employment. The [Legislature] further finds that the increasing use by employers of these "no comment" reference policies has undesirable, detrimental effects on the ability of prospective employers to evaluate applicants for employment and on the ability of many employees to compete for potential new employment.

(b) The [Legislature] declares it to be its purpose and policy, through the exercise of its powers to regulate commerce within this State, to ensure to the extent possible a free flow of employment reference information and to encourage employers to use responsible management practices with respect to the dissemination of employment references.

#### *Definitions*<sup>184</sup>

Section 3: For the purposes of this Act:

(a) The term "employer" means any person who now employs or who has employed one or more employees within the state, [but does not include the United States or any State or political subdivision of a State.]<sup>185</sup>

(b) The term "employee" means an individual who is employed or has been employed by an employer as defined here.

(c) The term "person" means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.

(d) The term "employment reference" means a written or oral communication containing information concerning a person's education, training, experience, qualifications and/or job performance, where the

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184. States may wish to modify these definitions so that they will be consistent with other similar definitions in other state statutes governing employers and employees.

185. Certain states may need to consider including the bracketed language to ensure consistency between this statute and the state's other statutes addressing issues of sovereign or governmental immunities.



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information is provided by the communicator to assist the recipient of the information in evaluating that person for employment.

### *Applicability of this Act*

Section 4: This Act shall apply with respect to employment references requested by or provided to persons within this State, [except that this Act shall not apply with respect to employment references requested from or provided by persons employed by and acting on behalf of the United States or any State or political subdivision of a State].

### *Duty to Provide Admonitory Reference Information*

Section 5: [Except as otherwise provided in the State antiblacklisting statute or service-letter statute,] an employer generally has no legal duty to provide employment reference information concerning a current or former employee to a prospective new employer who seeks the information to evaluate that current or former employee for prospective new employment. If asked for employment reference information concerning a current or former employee, however, an employer must disclose information, if any, that may be reasonably necessary to warn the inquiring prospective new employer of the current or former employee's propensity to engage in violent or dangerous conduct posing a threat of physical injury to others.

*Qualified Privilege to Provide Employment Reference Information and Conduct Causing Forfeiture of the Qualified Privilege* Section 6: (a) Any employer who provides an employment reference concerning a current or former employee to a prospective new employer of that current or former employee—whether or not the employer provides that reference pursuant to the duty imposed by Section 5— shall be protected by a “qualified privilege” from liability on account of that reference to the person who is the subject of the reference. Except as otherwise provided in Section 6(b), the “qualified privilege” shall protect the employer from liability to the current or former employee, on account of the employment reference, under the tort law theories of defamation, tortious interference with prospective contractual relation or tortious interference with prospective economic advantage.

(b) The employer providing an employment reference abuses the “qualified privilege” described in Section 6(a) and shall forfeit the protection from liability afforded by the “qualified privilege” if, and only if, the employer disseminates unfavorable employment reference information that is substantially false in material respects and the employer does so

(1) knowing the information to be false or acting with reckless disregard as to its truth or falsity;

(2) publishing the information to persons not reasonably believed by the publisher to be persons who will use the information to evaluate the referenced applicant for employment; or

(3) including information not reasonably believed to be relevant

to the referenced applicant's suitability for employment.<sup>186</sup>

(c) To the extent that caselaw predating this Act suggests that the presence of "malice" on the part of the employer providing the reference (or other circumstances besides those listed above) is necessary or sufficient for the employer to forfeit the qualified privilege in the employment reference context, that caselaw is expressly overruled by this Act.

(d) To overcome the qualified privilege described in this Section 6, a plaintiff must show by clear and convincing evidence that the defendant forfeited the privilege by abusing it in one or more of the ways described in Section 6(b).

*Attorney Fee Shifting*<sup>187</sup>

Section 7: (a) This Section 7 providing for awards of attorneys fees and expenses to prevailing litigants shall apply only in litigation in which an aggrieved current or former employee sues his or her current or former employer on account of an unfavorable employment reference; provided, however, that this Section 7 shall not apply to claims, if included in litigation as described by this Section 7(a), in which current or former employees allege that their current or former employers violated federal laws prohibiting employment discrimination.

(b) The presiding court shall order the losing defendant in litigation as described in Section 7(a) to pay the prevailing plaintiff's reasonable attorneys' fees and expenses if the factfinder specifically finds (1) that the defendant disseminated false and derogatory reference information concerning the plaintiff, *and* (2) that the defendant in disseminating the false information abused and forfeited the "qualified privilege" described in Section 6.

(c) The presiding court shall order the losing plaintiff in litigation as described in Section 7(a) to pay the prevailing defendant's reasonable attorneys' fees and expenses if the factfinder specifically finds that the unfavorable employment reference that gave rise to the plaintiff's complaint was substantially true and was not false in any material respect and that the defendant did not abuse the qualified privilege established by Section 6. Provided, however, that the court shall not order the losing plaintiff to pay the prevailing defendant's fees and expenses if the employment reference provided by the defendant included derogatory information concerning the plaintiff that was substantially true but was not relevant to the plaintiff's suitability for employment.

(d) The presiding court shall not order the losing plaintiff in litigation

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186. As noted in Part III, policymakers might wish to consider whether this standard for forfeiture of the privilege—i.e., the inclusion of irrelevant, damaging information—should be expanded to cover the employer's dissemination of *truthful* damaging information that is not relevant to the referenced applicant's suitability for employment. See *supra* note 119.

187. I have borrowed Sections 7(f)–(i), with minor modifications, from Alaska's rule of civil procedure, which provides for awards of attorney's fees to prevailing parties in civil litigation. See Alaska R. Civ. P. 82.

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as described in Section 7(a) to pay the prevailing defendant's reasonable attorneys' fees and expenses if the defendant prevailed in the litigation only by virtue of the "qualified privilege" described in Section 6, or if the employment reference provided by the defendant included derogatory information concerning the plaintiff that was substantially true but was not relevant to the plaintiff's suitability for employment. In these circumstances, each litigant would be responsible for his or her own attorneys' fees and expenses incurred in the litigation.

(e) The "special findings" needed to determine the application of the "fee-shifting" rule in these contexts shall be accomplished by the use of appropriate special verdict forms (in a jury trial) or findings of fact (in a bench trial).

(f) The court shall consider the following factors in determining in its discretion the appropriate amount of an award of fees pursuant to this section:

- (1) the complexity of the litigation;
- (2) the length of trial;
- (3) the reasonableness of the attorneys' hourly rates and the number of hours expended;
- (4) the reasonableness of the number of attorneys used;
- (5) the attorneys' efforts to minimize fees;
- (6) the reasonableness of the claims and defenses pursued by each side;
- (7) the presence of vexatious or bad faith conduct by either litigant;
- (8) the relationship between the amount of work performed and the significance of the matters at stake;
- (9) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;
- (10) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and
- (11) other equitable factors deemed relevant.

In announcing the amount of fees awarded, the court shall explain the reasons for the amount awarded.

(g) Motions for Attorneys' fees. A motion is required for an award of attorneys' fees under this rule. The motion must be filed by the prevailing party within 10 days after entry of judgment by the trial court. The prevailing party's failure to move for attorneys' fees within 10 days or such additional time as the court may allow shall be construed as a waiver of the party's right to recover attorneys' fees. A motion for attorneys' fees in a default case

exceeding \$50,000 must specify actual fees.

(h) Determination of Award. Attorneys' fees upon entry of judgment by default may be determined by the clerk. In all other matters the court shall determine attorneys' fees.

(i) Effect of Rule. The allowance of attorneys' fees by the court in conformance with this rule shall not be construed as fixing the fees between attorney and client.

*Procedure for Enforcement of Duty Established By Section 5*

Section 8: (a) Any person suffering physical injury caused in whole or in part by an employer's failure to comply with the duty to disclose admonitory reference information as set forth in Section 5 of this Act may bring a tort action against that employer in an appropriate court.

(b) [Any defendant who is sued by a person suffering physical injury caused in whole or in part by an employer's failure to comply with the duty to disclose admonitory reference information as set forth in Section 5 of this Act may seek full or partial indemnification or contribution from the employer whose breach of the duty set forth in Section 5 was a cause of the injury. This Section 8(b) may not be invoked by a defendant to recover indemnification or contribution from the employer if the defendant is the individual who personally injured the plaintiff.]

(c) Any tort action brought pursuant to this Section 8 shall be governed by the statutory and common law rules generally applicable in tort actions based upon personal injuries, except that the employer's duty with respect to the disclosure of reference information shall be the duty provided in Section 5 of this Act.

*Interaction with State Antiblacklisting and Service-Letter Statutes*

Section 9: (a) To the extent that any provisions in the State antiblacklisting statute or the State service-letter statute would appear to preclude employers from disseminating employment references as defined in this Act, those provisions are superseded by this Act. In other respects, the State Antiblacklisting Statute and Service-Letter Statute are preserved.

(b) Nothing in this Act shall be interpreted to permit employers to engage in conduct prohibited by federal or state statutes governing labor-management relations.

*Effective Date*

Section 10: This Act shall take effect \_\_\_\_\_.

V. CONCLUSION

The effects of the current legal framework on employment reference practices have attracted considerable attention in both the lay and legal press. I have argued here that any attempt—whether legislative or judicial—to promote the freer dissemination of employment references will likely be

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unsuccessful if the attempt fails to recognize the several important ways that the current framework encourages employers to adopt “no comment” reference practices.

As I have explained in this Article, I believe that the five most significant factors influencing employers’ incentives in this context are (1) the fact that the most tangible benefits of open reference practices are realized by the recipients, rather than the providers of reference information; (2) the fact that the expected costs of open reference policies have typically been borne almost exclusively by the providers of reference information; (3) the significant inconsistencies in the rules potentially determining employers’ liability for employment references; (4) the absence of a legal duty on the part of employers to respond to reference inquiries; and (5) the “American Rule” requirement that even employers whose reference practices are reasonable and responsible will pay significant attorneys’ fees if forced to defend those practices. This Article thus proposed legislation that should address and change employer’s perceptions and incentives with respect to these critical factors.<sup>188</sup> The legislation, if adopted, should encourage employers to provide references more freely, by reducing the existing deterrents to open reference practices and by imposing on employers an affirmative duty to provide reference information in circumstances where disclosure may be necessary to avert physical harm to others; the framework established by the legislation should also encourage employers to implement responsible management practices with respect to the investigation, documentation, and dissemination of employment reference information.

No single proposal can reasonably claim to be a panacea in this complicated context, especially in light of the legitimacy of the sometimes-conflicting interests and concerns of employers and employees. If nothing else, I hope that the proposals made here may help focus the ongoing debate over the current problems in the employment reference environment, and that these proposals may prompt legislatures or courts to consider more carefully and actively the need for comprehensive action to address the unfortunate “overdeterrent” tendencies of the current framework.

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188. Although the three proposed reforms correspond most directly to the last three factors identified above, they should also address the first two factors by reducing the expected costs for employers who adopt responsible open reference policies. The result should be to correct in at least some measure the current unfavorable balance between the benefits and costs to reference providers.

